Autonomous Vehicles

Mediating Complex and Catastrophic Cases

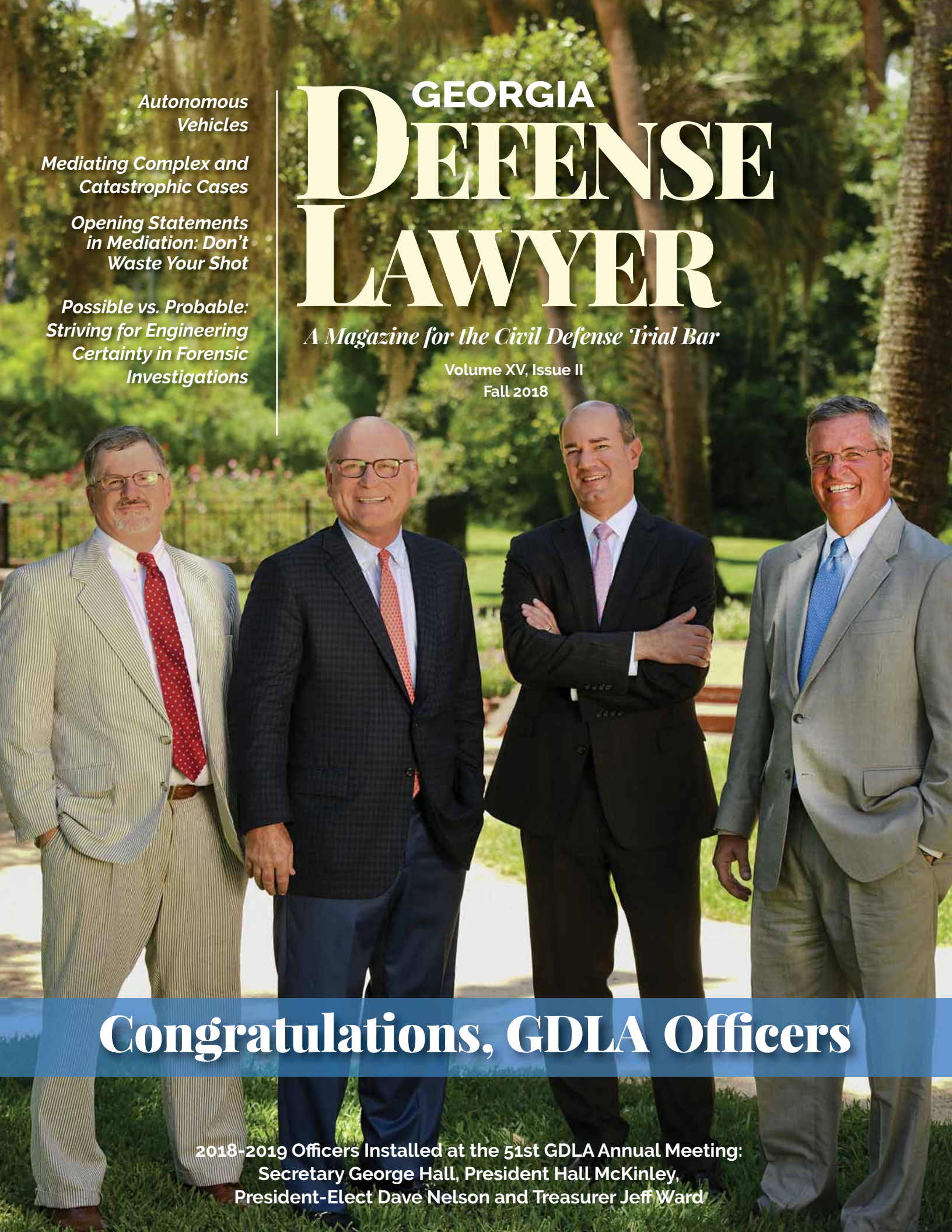
Opening Statements in Mediation: Don't Waste Your Shot

Possible vs. Probable: Striving for Engineering Certainty in Forensic Investigations

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XV, Issue II
Fall 2018



Congratulations, GDLA Officers

2018-2019 Officers Installed at the 51st GDLA Annual Meeting: Secretary George Hall, President Hall McKinley, President-Elect Dave Nelson and Treasurer Jeff Ward

FORCON INTERNATIONAL

John Leffler, PE

PREMISES LIABILITY EXPERT

www.forcon.com/experts/jleffler.pdf

- Licensed Professional Engineer (Mechanical) in 10 states.
- Board Certified in forensic engineering since 2007.
- Over 220 premises liability cases (130 slip-falls), 750+ cases total.
- Courtroom & deposition testimony experience, plaintiff & defense.
- ASTM pedestrian safety standards author & Committee Officer.
- Pedestrian safety training instructor, proactive & reactive topics.

Slip resistance / COF testing - unique expertise

- In charge of latest ASTM standards focused on reliability of tribometers and correlation of traction testing methods to human slips.
- Lead engineer for an industry-leading manufacturer of tribometers.
- Researcher in tribometer testing, with proficiency in field testing, interlaboratory studies, and unusual testing for unusual cases.
- In-depth knowledge about all tribometer types used by opposing experts, their limitations, methodologies, and relevant standards.
- Peer-reviewed author on bathing surface standards, with special expertise on bathmat traction standards.

Trip hazard, stairway, and illumination analyses

- Experienced with field inspections and researching relevant codes, ordinances, exceptions, and the archival history of applicability.
- In-depth familiarity with code/standard development, Federal rulemaking processes, and potentially-relevant foreign standards.
- Expertise in the analysis of walkway illumination and applicable requirements.

Offices in:
Atlanta • Annapolis • Philadelphia • Richmond • Tampa

FORCON INTERNATIONAL
770-390-0980 • 800-390-0980
www.forcon.com

INSIDE

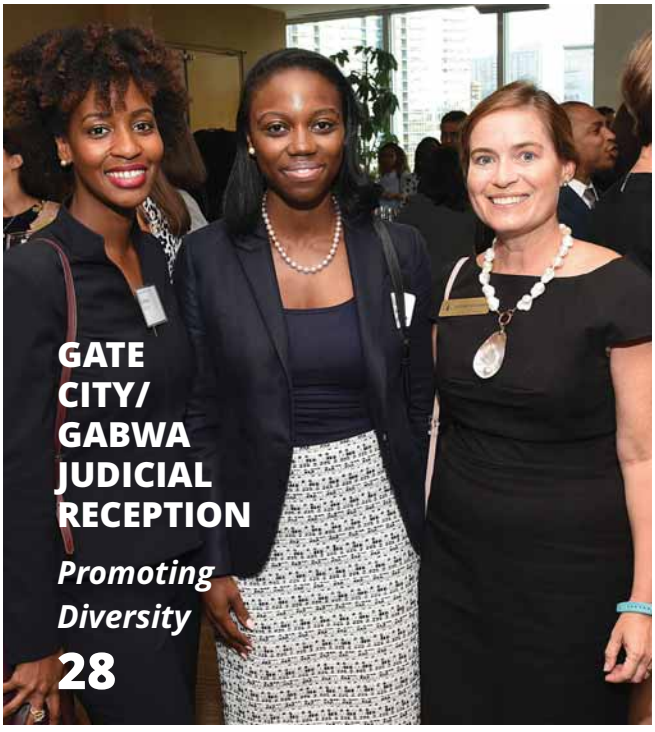
GEORGIA DEFENSE LAWYER

51st GDLA ANNUAL MEETING

30

IN EVERY ISSUE

AMICUS BRIEF



SPONSOR ARTICLES

CASE LAW UPDATES

HAPPENINGS

ESi

Engineering Consulting and Forensic Investigation

Over our 30-year history, ESI clients have turned to us to help with many of their high stakes and complex claims. These clients know they can rely on us to provide clear answers to their most challenging technical questions.

- Multidisciplinary Approach
- Industry Expertise
- Powerful Insights

www.engsys.com

GEORGIA DEFENSE LAWYER
Volume XV, Issue II

President's Message

As I pen my first message as President of GDLA, I think of the many distinguished leaders who have helped make GDLA such a great organization. I am the 51st President and GDLA has been blessed with outstanding leaders over all those years. In particular, I want to recognize and thank our past three leaders who now serve on the Executive Committee with me. Sally Akins, Peter Muller, and Matt Moffett provided leadership and guidance to this organization that have made it very easy for me to step into my current role. Also, as Sally concluded her year as President in June 2018, she received the General Practice and Trial Section Tradition of Excellence Award from the State Bar of Georgia. This recognized her great service to the Bar and made us all proud. It is a real feather in the cap of GDLA when our leaders are recognized by other legal and Bar organizations.

For 2018-2019, we have a number of important initiatives. Stemming from the #MeToo CLE presentation at the Annual Meeting, we are forming a women's caucus, which will be modeled after DRI and ABA/TIPS Women in the Law Committees and Task Forces. Our group will be chaired by Karen Karabinos of Drew Eckl & Farnham and Alycen Moss of Cozen O'Conner. They have organized a steering committee and will be planning the groups' first event for the winter of 2019, as well as a CLE program for the 2019 Annual Meeting (June 6-9) in Ponte Vedra, Florida. If you are interested in getting in on the ground floor with this committee, please contact Karen and/or Alycen directly.

We currently have more than 925 members and our goal this year is to cross the 1,000-member mark. We hope to grow membership in some of our larger defense firms and ask them to show their support for GDLA. We also hope to expand our membership with younger lawyers becoming active in bar organizations.

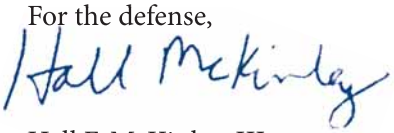
GDLA continues to be active on the amicus front and has been on the prevailing side in numerous significant legal decisions on insurance and tort law over the last year. These efforts continue still with three briefs in the works now.

On February 7, 2019, we will host our 16th Annual Judicial Reception at State Bar headquarters. This is attended by many metro trial, appellate, and federal court judges and is always a highlight of the year. It is one of the real benefits of membership and is always well attended.

We will also be planning another installment in our annual Expert Deposition Skills Workshop to immediately precede the Judicial Reception at the State Bar. Last year's program on deposing an orthopedic surgeon, as well as exploring medical funding issues, was attended by over 100 lawyers.

The GDLA officers this year include President-Elect Dave Nelson of Macon, Treasurer Jeff Ward of Brunswick, and Secretary George Hall of Augusta, so the State of Georgia is well represented. I look forward to working with the officers and entire Board of Directors to make this a great year for GDLA.

For the defense,



Hall F. McKinley, III
Drew Eckl & Farnham, Atlanta

Member News & Case Wins

MEMBER NEWS

GDLA President **Hall F. McKinley, III**, of **Drew Eckl & Farnham's** Atlanta office, was honored by the **American Bar Association's Tort Trial and Insurance Practice Section (TIPS)** with its Andrew C. Hecker Memorial Award. The award recognizes a person who consistently demonstrates the qualities of leadership, outreach, enthusiasm, professionalism and pride in TIPS and its accomplishments. It was presented at the ABA Annual Meeting in Chicago in August.

GDLA Past President **Lynn M. Roberson** received the **Atlanta Bar Association's** Charles E. Watkins, Jr. Award, the highest honor bestowed during the group's Annual Meeting. The award recognizes demonstrated distinctive and sustained service to the Atlanta Bar. Ms. Roberson notably served as President of GDLA and the Atlanta Bar simultaneously.

GDLA Past President **Sarah B. "Sally" Akins** of **Ellis Painter Ratterree & Adams** in Savannah was honored by the State Bar of Georgia General Practice & Trial Section with its Tradition of Excellence Award in the civil defense category. The award recognizes 20+ years of achievement as a trial lawyer, significant contributions to CLE and State Bar activities, a record of community service, and a personal commitment to excellence.

Weymon H. Forrester and **James E. Brim III** announced the merger of their firm, **Forrester & Brim**, with **Huff Powell & Bailey** to open a Gainesville office for the firm. The address remains 459 E.E. Butler Parkway; email addresses are now @huffpowellbailey.com.

Sarah S. Dumbacher, formerly with **Drew Eckl & Farnham,** has joined **FisherBroyles** as a partner in its Atlanta office. Her practice focuses on defending individuals, health plans and plan administrators in hospital billing dispute litigation.

Hall Booth Smith announced the return of longtime medical malpractice attorney **Terrance C. "Terry" Sullivan** to the firm as of counsel in the Atlanta office. His move marked a reunion for many of the firm's longest-serving attorneys who worked with Mr. Sullivan in the firm's earliest days from 1980 to 1999 when it was called Sullivan Hall Booth & Smith. Over a career that spans four decades, He has tried more than 175 jury trials to verdict and has conducted more than 50 mediation; he has been admitted by pro hac vice into 29 states. Mr. Sullivan is a member of the American College of Trial Lawyers and the American Board of Trial Advocates.

Downey & Cleveland announced the addition of **Jack G. Slover, Jr. a**s of counsel to the medical malpractice defense firm based in Marietta. He was previously a name partner at Hall Booth Smith & Slover (now **Hall Booth Smith)** before joining a plaintiff's firm in 2013. During his 41 plus years of practice, Mr. Slover has tried in excess of 350 cases to verdict in both the state and federal forum. He is a member of the American Board of Trial Advocates and American Board of Professional Liability Attorneys.

Watson Spence in Albany announced **Christopher L. Foreman** was named a partner in the firm. He focuses his practice on complex areas of civil litigation, including construction defect, premises liability, business litigation, and wrongful death and catastrophic injury cases throughout South Georgia. He serves on the editorial board of this publication.

McAngus Goudelock & Courie is announced the addition of **Jordan Raymond** to the firm's Atlanta office. Ms. Raymond focuses her practice on general litigation, transportation and trucking law. She earned her J.D. from Harvard Law School and her B.S. from Stanford University. Prior to joining MGC, she practiced tort litigation law.

Ann Baird Bishop of **Sponsler Bishop** in Atlanta was elected to serve as Chair of the Board of Visitors for Mercer Law School for a three-year term ending in 2019. She also was honored with the 2017 Distinguished Service Award from the Workers' Compensation Section of the State Bar of Georgia. In addition, she received one of the 2018 Justice Benham Awards for Community Service.

Wilson Elser's Atlanta office announced **W. Shawn Bingham**, formerly with **Cruser Mitchell** and **Baker Donelson Bearman Caldwell & Berkowitz**, has joined the firm as an associate. His practice focuses primarily on trucking/transportation, insurance, employment, product liability, and business litigation.

Allison M. Escott, formerly a partner at **Mozley Finlayson & Loggins**, has joined **Drew Eckl & Farnham** as of counsel. She will continue her practice in general insurance defense, including automobile negligence, commercial vehicle negligence, and premises liability.

Robert L. "Bobby" Shannon, Jr. has opened the Atlanta office for **Wheeler Trigg O'Donnell**, a Den-

ver-based litigation boutique; he serves as office managing partner. He previously practiced with **Hall Booth Smith** for more than 27 years. He has tried more than 65 cases nationwide and successfully defended sophisticated clients in complex matters exceeding $1 billion in exposure. Since 2003, Mr. Shannon has parachuted into more than 150 cases just weeks from trial and has won or achieved desirable results in nearly all of them. Prior to becoming an attorney he served in the U.S. Air Force for seven years before he transitioned to the Air National Guard to attend law school at the University of Georgia. After graduating in 1991, he concurrently practiced law as he continued to serve in the Air National Guard/U.S. Air Force to include multiple deployments and a final assignment at the Pentagon until his retirement on March 1, 2017, with the rank of Major General.

CASE WINS

Andrew Horowitz of **Drew Eckl & Farnham**'s Atlanta office recently received a favorable ruling from the Georgia Court of Appeals on behalf of a guardrail-installation contractor in a case stemming from a horrific highway accident on Interstate 75 in which two motorists were killed. The accident occurred when the motorists' vehicle was pushed off the highway into the median area, where it struck a concrete pier, killing the motorists instantly. Their daughter and estate subsequently sued the guardrail contractor, which had recently installed a stretch of guardrail alongside the concrete pier, alleging that the installation violated applicable regulations as it was too short.

In affirming summary judgment to the guardrail contractor, the Court of Appeals held that Georgia's acceptance doctrine insulated the contractor against tort liability stemming from its previous work. That doctrine generally provides contractors have no tort liability for accidents, claims, or damages that occur after the owner accepts their completed work. Here, the accident occurred nearly 10 months after the Georgia Department of Transportation accepted the guardrail work and reclaimed control over the project area. Consequently, the Court of Appeals determined the guardrail contractor was not responsible for the accident, even if the guardrail were in fact too short. The Court of Appeals appeared to have been further persuaded by the undisputed evidence that the contractor played no role in the project's design.

This case is *Stopanio v. Leon's Fence and Guardrail, LLC et al.*, (A18A0587).

Continued on next page

5775 Glenridge Drive, NE, Suite E100
Atlanta, GA 30328
678.222.0248 • 1.844.399.6032 toll free
www.bayadr.com

BAY
MEDIATION & ARBITRATION SERVICES
Time Well Spent

Effectively Resolving Disputes

SINCE 2002

Business & Commercial | Civil Rights/Section 1983
Construction | Divorce & Family
Employment & Labor | Environmental
Healthcare/Health Law | Injuries & Accidents | Insurance
Intellectual Property | Premises Liability
Professional Malpractice | Real Estate & Condemnation
Wills, Trusts & Probate | Workers' Compensation

BAY Mediators & Arbitrators


Bill Allred


Bruce Barrickman


Mike Bass


Jerry Baxter


Art Brannan


Michael Braun


Victor Faenza


Bart Gary


Ed Halman


Tom Harper


Humberto Izquierdo


Sonny Jester


Patricia Killingsworth


Raymond Kurey


Henry Quillian


Anandhi Rajan


Tom Sampson


Woody Sampson


Luis Scott


Chris Simon


Bruce Steinfeld


Jim Stewart


Tanya Tate


John Thielman


Valerie Tobin


Lee Wallace


Doug Witten


Scott Young

WE TAKE THE TIME TO LISTEN WELL, SO YOUR MONEY IS WISELY SPENT **TIME WELL SPENT**

Member News & Case Wins

Continued from previous page

Nicole C. Leet and **Michael J. Rust** of **Gray Rust St. Amand Moffett & Brieske** in Atlanta successfully appealed a plaintiff's verdict on the issue that the financial interest of Plaintiff's star expert witness, Dr. James Chappuis, should have been disclosed to the jury. GTLA filed an amicus brief on this specific issue, arguing heavily that the financial interest (a lien) was a collateral source. GDLA filed an amicus brief in March, supporting the Appellant's argument that a lien was not a collateral source. The Court of Appeals agreed that a lien was not a collateral source, and found the trial court erred in excluding the information which could go to Dr. Chappuis's credibility and bias. The case is *Stephens v. Castano-Castano*, Georgia Court of Appeals Case No. A18A0100. The GDLA amicus brief can be found in the members only area online.

Henry D. Fellows, Jr. and **Michael Gretchen** of **Fellows LaBriola** in Atlanta and their co-counsel obtained a dismissal of a putative federal class action. The plaintiffs alleged that Payment Alliance International (PAI) and the other defendants charged them unauthorized and excessive fees for merchant payment processing services. Merchant payment processing services allow merchants to accept payment for goods and services via credit and debit cards. Defendant Global Payments Direct, Inc. is a payment processor, while defendant PAI and defendant Clearant, LLC, are merchant acquirers.

U.S. District Judge Mark Cohen granted the motions to dismiss all the defendants. The Court determined that the parties had entered into "Card Service Agreements" (CSAs), which were accepted through performance by the parties, although they were not signed by the defendants. The Court noted "[w]here a valid contract exists, unjust enrichment claims are barred as a matter of law," quoting *Donchi, Inc. v. Robdol, LLC*, 283 Ga. App. 161, 167 (2007). The Court therefore dismissed the plaintiffs' unjust enrichment claim in Count I of the class action complaint.

The Court also dismissed the plaintiffs' claims in Count II for (1) breach of contract and (2) breach of the covenant of good faith and fair dealing because of the "Limitation of Liability" clause found in the Terms and Conditions in the CSAs. The pertinent portion required notice in writing "within 60 days of such failure to perform or, in the event of a billing error, within 90 days of the date of the invoice or applicable statement. Merchant expressly waives any such claim that is not brought within the time periods stated herein."

The plaintiffs did not purport to have complied with the notice provision, but contended that the clause was not enforceable because it was exculpatory, unconscionable, and vague. The Court rejected the plaintiffs' contentions, determining the clause was substantively and procedurally valid and not vague. The Court also rejected the plaintiffs' plea for a justification in the delay in notification, determining the plaintiffs failed to allege or explain why the purported overbilling could not have been discovered in the initial time period.

Although the Court noted "whether a delay is justified generally is an issue of fact to be resolved by a jury," citing *Eels v. State Farm Mut. Auto. Ins. Co.,* 324 Ga. App. 901, 904 (2013), it stated that to survive a motion to dismiss, the stated justification for delay must be "plausible" under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) standard. The Court held that the plaintiffs' explanation did not justify the delay, and it therefore dismissed Count II of the class action complaint.

The case is *Cobra Tactical, Inc. et al. v. Payment Alliance International Inc. et al.*, 2018 WL 1473828, __ F.Supp.3d __ (N.D. Ga. 2018).

Sun S. Choy, Jacob E. Daly, and **Wesley C. Jackson** of **Freeman Mathis & Gary i**n Atlanta convinced the Georgia Court of Appeals to reverse a post-apportionment judgment of $10,640,000 against the City of Albany in a case involving the murder of Plaintiffs' son outside an illegal nightclub.

At trial, Sheryl Stanford and Wilfred Foster, as surviving parents and co-administrators of their son's estate, argued the City was partially responsible for the murder of their son at Brick City, a night club in Albany, after a fight that started in the club. It was undisputed that, while Brick City was only licensed as a recording studio, the City allowed it to operate as an illegal nightclub even though it knew the establishment was rife with drug use, illegal alcohol sales, and violence. In an effort to overcome sovereign immunity, Plaintiffs asserted the City maintained a nuisance by failing to revoke Brick City's occupational tax certificate.

The jury awarded Plaintiffs $15,200,000 in damages and apportioned 70 percent to the City, 10 percent to the owners and operators of Brick City (who were in default), 13 percent to the person who shot and killed plaintiffs' son, and 1 percent each to the seven others who participated in the fight. The trial court denied the City's motion for a new trial and motion for judgment notwithstanding the verdict, and so the City appealed.

The Court of Appeals reversed, holding that the City was entitled to sovereign immunity despite Plaintiffs' allegation that the City maintained a nuisance by failing to revoke Brick City's occupational tax certificate while local law enforcement investigated possible criminal activity there. Specifically, the Court of Appeals held that the City's decision not to revoke Brick

GDLA Files Amicus Brief Regarding an Insurer's Duty for Failure to Settle

On September 4, 2018, GDLA filed an *amicus curiae* brief in the Supreme Court of Georgia in support of appellant First Acceptance Insurance Company of Georgia, in a case involving an insurer's duty for bad faith/negligent failure to settle.

GDLA previously filed an *amicus curiae* brief in support of First Acceptance's petition for certiorari, arguing that the Court should hear the case because the Court of Appeals' decision converted legal issues—interpretation of a settlement offer and whether a legal duty exists—into questions of fact. In its Order granting certiorari, the Supreme Court raised two issues that tracked the issues from GDLA's prior brief.

In its recent brief, GDLA argued the Court of Appeals erred in finding that questions of fact exist as to whether letters from the claimants' attorney offered to settle claims within the insured's policy limits and whether those letters established a 30-day deadline to accept, because interpretation (or construction) of a settlement offer presents a question of law for a court and the Court of Appeals did not follow the three-step process for interpreting legal documents, like a settlement offer. GDLA argued, utilizing the three-step process for interpretation, the pertinent letters did not trigger a duty to settle because there was no reasonable interpretation of the letters that would indicate the insurer needed to respond within a particular amount of time or risk an excess judgment against its insured.

GDLA also argued an insurer's duty to settle only arises upon receipt of an unambiguous offer to settle within the insured's policy limits. GDLA pointed out there is nothing in Georgia statutes or existing case law requiring an insurer to affirmatively initiate settlement negotiations for bodily injury claims. GDLA also noted a rule that an insurer's duty to settle arises when the insurer knows or reasonably should know settlement within policy limits is possible was contrary to Georgia precedent, statutes, and public policy; was unworkable as a matter of practicality; and would likely lead to several unintended consequences.

The case is *First Acceptance Insurance Company of Georgia, Inc. v. Hughes*, Supreme Court of Georgia, Case No. S18G0517.

GDLA thanks the authors, David Atkinson and Jonathan Kandel of Swift Currie in Atlanta, for their efforts, particularly since this is the fourth brief they have penned related to this case. We also thank Amicus Committee Co-Chairs Marty Levinson of Hawkins Parnell in Atlanta and Garret Meader of Drew Eckl in Brunswick. for their service. The brief is available under Amicus Policy & Briefs in the members only area of our website. ◆

Member News & Case Wins

Continued from previous page

City's occupational tax certificate was a governmental (i.e., discretionary) function for which sovereign immunity has not been waived under O.C.G.A. § 36-33-1(b). In a concurring opinion, Judge Elizabeth Gobeil emphasized the absence of precedent applying a "nuisance exception" to sovereign immunity to a claim based on a public nuisance on private property. Judge John Ellington dissented because he would have applied precedent finding municipalities are not entitled to sovereign immunity when they create or maintain a nuisance that is dangerous to life and health.

Plaintiffs filed a motion for reconsideration, which the Court of Appeals denied, and they are expected to seek certiorari review in the Georgia Supreme Court. The case is *City of Albany v. Stanford*, No. A18A0699.

Lisa N. Higgins of **Drew Eckl & Farnham** in Brunswick recently obtained summary judgment on behalf of an international retailer in a premises liability case. Judge Randy Hall of the Southern District of Georgia, Statesboro Division, held that in order to establish constructive knowledge, Plaintiff needed not only to show that Defendant failed to implement or follow a reasonable inspection procedure but also that the hazard was on the ground long enough that it could have been discovered had Defendant exercised reasonable care in inspecting the premises. Plaintiff failed to do so as there was no genuine issue of material fact as to how long the hazard was on the floor— for less than a minute. Therefore Plaintiff could not, as a matter of law, demonstrate that even if Defendant had a reasonable inspection procedure, they would have discovered the hazard before Plaintiff fell. The Court awarded judgment in favor of the Defendant on all of Plaintiff's claims. ◆

NELSON
FORENSICS

Forensic Engineering

Civil/Structural Engineering

Mechanical Engineering

Electrical Engineering

Forensic Architecture

Materials Science

Chemistry & Environmental Science

Roofing Materials Testing Laboratory

Cost Estimating and Appraisal

Evidence Storage

1.877.850.8765
www.nelsonforensics.com

NELSON
FORENSICS

EXPERT *FORENSICS*
EXPERT *SOLUTIONS*

Nelson Forensics is a globally-recognized consulting firm specializing in Forensic Engineering, Forensic Architecture, Accident Reconstruction, Chemistry & Environmental Science, Roofing Materials Testing, Cost Estimating & Appraisal, and Evidence Storage.

www.nelsonforensics.com
1.877.850.8765

Welcome, New GDLA Members!

The following were admitted to membership in GDLA since the last edition of this magazine.

Sarah Elizabeth Akinosho
Downey & Cleveland, Marietta

Terry Brantley
Swift Currie McGhee & Hiers, Atlanta

Christopher Alan Brookhart
Downey & Cleveland, Marietta

Ross Bundschuh
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Cynthia A. Daly
Law Office of Nancy W. Phillips, Savannah

Graham Wade Davis
Downey & Cleveland, Marietta

Dean Dellinger
Drew Eckl & Farnham, Atlanta

Kevan G. Dorsey
Swift Currie McGhee & Hiers, Atlanta

Nathaniel Edmonds
James Bates Brannan Groover, Macon

Trenton Edwards
Gower Wooten & Darneille, Atlanta

Katelyn Green
Drew Eckl & Farnham, Atlanta

Steven Harkins
Greenberg Traurig, Atlanta

Brittany Camile Hart
Drew Eckl & Farnham, Atlanta

Thomas P. Johnson
Gower Wooten & Darneille, Atlanta

Barret Kirbo
Jones Cork, Macon

Pamela R. Lawrence
Butler Snow, Atlanta

Thomas C. MacDiarmid
Gray Rust St. Amand Moffett & Brieske, Atlanta

Kristin Massee
Ellis Painter Ratterree & Adams, Savannah

Brandon Moulard
Nelson Mullins Riley & Scarborough, Atlanta

Sunshine Nasworthy
Cruser & Mitchell, Norcross

Robert Ernest Noble
Goodman McGuffey, Atlanta

Chris Perniciaro
Gray Rust St. Amand Moffett & Brieske, Atlanta

Dale C. Ray, Jr
Fain Major & Brennan, Atlanta

Matthew R. Sessions
Downey & Cleveland, Marietta

Kenneth Edward Sexton
Troutman Sanders, Atlanta

Dustin Sharpes
Stone Kalfus, Atlanta

Carter Weathington
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Michelle Guthrie Whitelaw
Drew Eckl & Farnham, Atlanta

Alisha Irene Wyatt-Bullman
City of Atlanta Department of Law, Atlanta

Elizabeth Whittinghill
Moore Clarke DuVall & Rodgers, Albany

Recruit your colleagues to join GDLA!

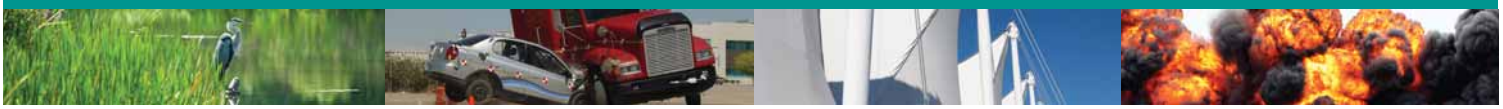
We have crossed the 925-member mark and continue to expand the voice of the civil defense bar in Georgia.

Prospective members can apply online by visiting the Membership tab at **www.gdla.org**.

Go to **Find a Defense Lawyer** on our homepage to see if someone is already a member.

Exponent®

Engineering and Scientific Consulting



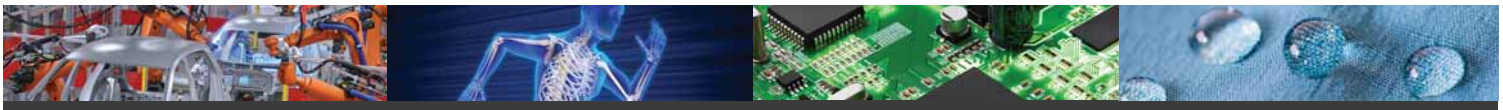
Our Atlanta office provides expanded capabilities to our clients based in the Southeast.

As one of the largest engineering and scientific consulting firms in the U.S., Exponent can provide you with access to both our local Atlanta staff, as well as more than 500 other Exponent consultants in over 90 technical disciplines.

Our service areas include:

- Biomechanics
- Biomedical Engineering
- Buildings & Structures
- Chemical Regulation & Food Safety
- Civil Engineering
- Construction Consulting
- Ecological & Biological Sciences
- Electrical Engineering & Computer Sciences
- Environmental & Earth Sciences
- Health Sciences
- Human Factors
- Industrial Structures
- Materials & Corrosion Engineering
- Mechanical Engineering
- Polymer Science & Materials Chemistry
- Statistical & Data Sciences
- Technology Development
- Thermal Sciences
- Vehicle Engineering

Exponent's Atlanta office provides consulting expertise to insurance companies, lawyers, as well as direct to private, public and multinational companies in areas such as energy, transportation, consumer products, textiles, and medical devices.



3350 Peachtree Road NE, Suite 1125 • Atlanta, GA 30326 • 678.412.4800

atlanta-office@exponent.com

Exponent is certified to ISO 9001

888.656.EXPO • www.exponent.com

Autonomous Vehicles

By Mike Urban
Rimkus Consulting Group

It's 2018, and if you believed the movies you watched in the 90s, we were supposed to have fully autonomous vehicles somewhere between 2004 (Timecop) and 2032 (Demolition Man). Well here we are, smack-dab in the middle of that modest range; my dream of being Michael Knight (circa 1982-1986) still hasn't come to pass, and not just because the Trans Am was discontinued back in 2002. While the Hollywood psychics in the movie industry predicted the future of autonomous vehicles well before the technology was available, their visions, in some ways, have not been far off from what has come to be and what will likely be.

So, where are we on the curve and what is needed to complete the jump off the end to full autonomy? Let's first have a look at the different levels of autonomy, as classified by the Society of Automotive Engineers (SAE). SAE classifies autonomy into 6 categories, Levels 0 through 5. Level 0 is your standard, everyday vehicle on the road with no autonomous or driver assist systems. In Level 1 vehicles, the vehicle will take over either longitudinal (speed) or lateral (lane keeping) control while the driver controls the other. Level 2 vehicles have two or more systems that allow the driver to let go of the steering wheel and the pedals at the same time. Level 3 vehicles still require a driver, but will allow the vehicle to function autonomously in certain circumstances with a driver as the back-up, if needed. Level 4 is a highly automated vehicle with no expected interaction from a human driver. A Level 5 vehicle is fully autonomous with no need for a human driver. Level 5 vehicles will not have steering, brake or throttle controls in the passenger cabin. The Tesla, for all of its bells and whistles (or cameras and radar as it were), still sits in the Level 2 group, as does GM's new "Smart Drive" system. Currently, there is no production vehicle that exceeds the Level 2 status.

Presently, there are several vehicles that provide some form of driver assistance technology. These are the foundation on which a fully autonomous vehicle will ride. Some of the systems currently found in production vehicles are:

- Lane Keep Assist
- Adaptive Cruise Control
- Automatic Emergency Braking
- Pedestrian Detection
- Traffic Sign Recognition
- Traffic Jam Assist
- Auto Park
- Side Collision Avoidance

Each of the above systems work with data collected from cameras mounted around the vehicle and radar systems that sense obstacles and incoming hazards. So what's missing if a vehicle equipped with all of the current technology still cannot be called a fully autonomous vehicle? Well, the problem first lies in the area of 'it's not perfect.' For every system above, there is a corner case, where the system is limited and may not react or may not react correctly. A prime example would be a radar system that looks below the trailer parked across a road and doesn't stop the vehicle in time.

The addition of a lidar system—the laser-based system similar to radar—aids in the detection of obstacles and provides the necessary information needed to supplement the systems already in the production vehicle market. If you have ever seen a fully autonomous test vehicle on the road, you would recognize the lidar unit as the spinning hat on the roof of the vehicle—a device that is the thorn in the side of both the styling and accounting departments. High-end lidar systems used in autonomous vehicles cost in the vicinity of $75,000. There are smaller companies that are coming to market with "near top performance" lidar systems at a much more respectable $12,000. The cost of lidar systems is still not in the 'production vehicle' zone, but if Moore's law is to be applied and believed in this instance, the cost of the technology will decrease as the level of technology increases, soon making lidar systems affordable enough to be the sole pain of the styling department.

Another technology needed is the external communication between the vehicle and its surroundings (other vehicles, traffic signals,

Continued on page 44

Piece by piece. Fact by fact. Getting to the Big Picture.

Rimkus has the forensic consultants and expert witness services to piece together the cause of all types of claims and disputes. Our forensic engineers, fire investigators, scientists, and consulting experts are recognized for their commitment to service excellence. Our clients can count on timely delivery, clear communication – and Getting to the Big Picture.

- Energy
- Environmental Sciences
- Oil and Gas
- Fire Sciences
- Construction
- Offshore Marine
- Industrial Hygiene
- Toxicology
- Trucking
- Accident Reconstruction
- Biomechanics
- 3D Animation

www.rimkus.com • 800-580-3228

RIMKUS
CONSULTING GROUP, INC.
Forensic Engineers and Consultants

Mediating Complex and Catastrophic Cases to Resolution: A View from the Mediator

Lynn M. Roberson
Miles Mediation and Arbitration Services

After 36 years as a litigator (and counsel for many parties in mediations, as well as a mediator myself) I have put on my neutral hat as a full-time mediator. During those 36 years, I represented both plaintiffs and defendants, but I spent most of the past 30 years as defense counsel for defendants in personal injury cases, particularly in premises liability matters involving serious injury and/or arising out of violent crime.

Mediation was not really used in litigation for the first 10 years of my practice so cases were either won on motion, tried, or settled with negotiations among the attorneys. As ADR has become ubiquitous in all areas and all parts of the country, fewer and fewer cases are tried to verdict and lawyers can anticipate the judge ordering the parties to mediate the case before being placed on a trial calendar. Most cases resolve at mediation and many are settled later prior to trial so the process has a documented history of success.

Particularly with the highest stakes litigation (cases involving death or serious injury, serious coverage issues or bad faith) many defendants and insurance carriers are reluctant to take these cases to a jury for fear of uncontrolled expenses of litigation and unanticipated verdicts. Thus, many corporate defendants also insist on making an effort at mediation.

Lay plaintiffs may have little appreciation for the time, expense and stress involved in seeing a case through verdict in front of a jury which may or may not seem like "peers" to the plaintiff. The anticipation or dread of having to testify in open court can be a giant stressor for a plaintiff once she realizes her entire medical history or other personal matters may be shared publicly for all the world to hear. Plaintiffs may also have trouble grasping how slow and tedious the litigation process can be.

All these factors and more explain why both sides of the litigation may have an interest in resolving the dispute privately through mediation. This article will offer my insights regarding the value defense lawyers and their clients can bring to the process to facilitate resolution.

1. Advantages of Mediation

Time and expenses of litigation confront both sides of the litigation, as well as unexpected and/or unreasonable jury verdicts. The primary advantage for both sides in mediation is that the parties control the outcome, not a judge or jury. Thus, the plaintiff is not forced to live with an adverse or disappointing verdict and the defendant is never forced to pay more than it was willing to pay. The parties control their own fate.

Mediation is usually much less adversarial than a trial. It is far less stressful for a plaintiff as no testimony or cross examination need be faced. The process is much more informal and private.

For defendants such as professionals facing a claim of malpractice, employers facing claims of discrimination, or product manufacturers facing claims of product defects, mediation resolution may allow a confidentiality agreement. (Obviously, in some matters, judges do not allow full confidentiality.) Protection of the parties' interest in privacy cannot be respected in a public trial. In some premises liability cases involving claims of sexual assault or rape, this can be a particularly attractive benefit for some plaintiffs.

The primary benefit to mediation is its high success rate, resolving most cases without the necessity of a trial.

2. When should you and your client seek mediation?

There is no requirement that mediation only occur after discovery is concluded. Many insurance carriers are seeking early resolution shortly after suit is filed or even before filing, especially when there is little question that the insured was at fault and the plaintiff's injuries are clearly related to the event. Some background on the plaintiff is desirable but some cases just get

Continued on page 46

THE FUTURE OF RESOLUTION

Our comprehensive dispute management approach helps clients manage their disputes on their own terms. Whether through arbitration, mediation or early case evaluation, our clients come to us seeking to take control of their disputes. Miles neutrals are diverse, innovative, experienced, and passionate. We know what is at stake for our clients and how to help them achieve successful resolution.

MILES
MEDIATION & ARBITRATION

milesmediation.com

ATLANTA	SAVANNAH	ATHENS
678-320-9118	912-417-2879	678-661-0755

Opening Statements in Mediation: Don't Waste Your Shot

By Terrence Lee Croft
Georgia Academy of Mediators and Arbitrators

Today, many mediation advocates and some mediators encourage mediations without opening statements. Sometimes, they are directed to do so by professional claim representatives, clients or in-house counsel, who think they are being efficient, experienced users of the mediation process by getting straight to the business of caucuses—the negotiations-and avoiding the possibility of adversarial unpleasantness which can arise when the two sides debate the merits of their claims and counter-claims in the same room. More often, it is the lawyers themselves who make this mistake by confusing litigation advocacy with mediation advocacy.

In a courtroom, there is a triangle of communication between the advocate, the jury, and the other side. The advocate must entertain, enlighten and persuade the jury, while establishing credibility with them. The advocate may emphasize the misdeeds of the other side with exaggerated language and emphasis. Offending the other side is of little concern.

Not so in mediation where there is no triangle, and the advocate is literally looking at the other side right in the eye, across the table. Name calling, offensive language and overstatement are likely to aggravate the other side past the point of reconciliation.

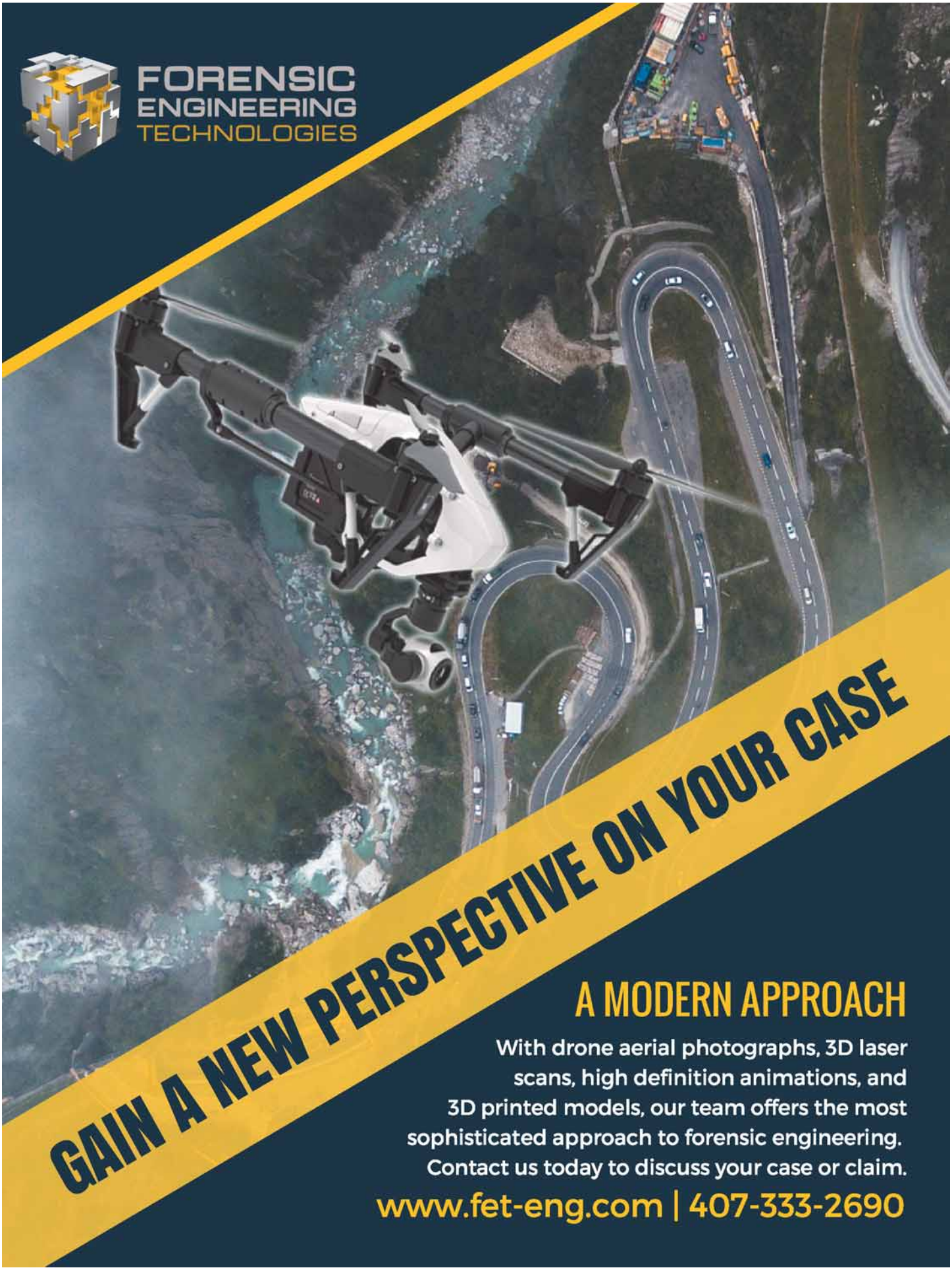
Mediation provides a unique opportunity to talk directly to the other side, which should not be waived or squandered. Explaining your position, often as simply as a children's Sunday school teacher, and in the context of seeking a compromise rather than blustering about a rout, by means of a low-key, but persuasive presentation, helps the other side understand why you predict your side will prevail. Expressing respect for the difference in opinions of the parties and emphasizing the need for a compromise should not polarize the negotiations, but may get them off on a better footing. This approach is even more compelling when the party on the other side is the only one in the room who is not a lawyer and not experienced in claim evaluations.

Waiving the opening statement means that each side is functionally mediating against the mediator, instead of each other. Every time the mediator comes into a caucus room of a party, the mediator is blamed for the message the mediator brings from the other side. Those in the caucus room argue with the mediator and seldom listen to the mediator's guidance. They don't seek the mediator's advice. The mediator's role is diminished and compromise becomes less likely.

Mediations are not "one size fits all," no matter what court annexed programs use as their paradigm. Today, by agreement, many disputes go to mediation before litigation commences. Without pleadings, discovery or dispositive motions, it is highly unlikely that each side knows as much about the case as they would after those procedures. This likelihood is diminished further by a refusal to exchange mediation statements before the mediation. Good advocates know that a written mediation statement for the mediator can be slightly revised and provided to the other side sufficiently in advance of the mediation for counsel and client to have carefully reviewed it. This may allow a more efficient presentation during the actual opening statement at the mediation.

If you are in a court ordered and untimely mediation, or the possibility of settlement is otherwise impaired, you should be interested in using the mediation to learn as much about your opponent's case as possible. A detailed opening statement could be of great assistance in such a situation. Similarly, a client that does not ask for or consider your evaluation of the case

Continued on page 48


FORENSIC
ENGINEERING
TECHNOLOGIES
GAIN A NEW PERSPECTIVE ON YOUR CASE
A MODERN APPROACH
With drone aerial photographs, 3D laser scans, high definition animations, and 3D printed models, our team offers the most sophisticated approach to forensic engineering. Contact us today to discuss your case or claim.
www.fet-eng.com | 407-333-2690

Possible vs. Probable: Striving for Engineering Certainty in Forensic Investigations

By Matthew Wagenhofer, Ph.D., P.E.
FORCON International

Juror eight's impassioned efforts to persuade his fellow jurors that reasonable doubt exists regarding the guilt of an 18-year-old accused of stabbing his father to death are a hallowed part of American movie history. The film has been parsed and studied in numerous settings by countless people and this humble discussion adds one more instance to that list. Rather than "reasonable doubt," though, "engineering certainty" is the current focus and the quick exchange quoted above cuts directly to the heart of the matter.

"It's possible. But not very probable."
-12 Angry Men (1957)

Many, if not all, of you defense lawyers have either written or read a forensic engineer's report that includes language similar to, "I conclude, to a reasonable degree of engineering certainty, the following." What is engineering certainty? How, in a forensic engineering investigation, does one establish it? In what processes should an investigator engage? Are there guidelines and standards that one can follow to ensure the conclusions drawn from the investigative work are sound to a "reasonable degree?" This article discusses the answers to those questions in light of common examples of forensic engineering investigations.

First things first, a definition of forensic engineering is in order. Per the National Academy of Forensic Engineers:[1]

> Forensic Engineering is the application of the art and science of engineering in matters which are in, or may possibly relate to, the jurisprudence system, inclusive of alternative dispute resolution.

Further, ASTM E2713-11 Standard Guide to Forensic Engineering describes the role an engineer serves to both the client as well as the court, jury, or other triers of fact. First to the client:[2]

> The engineer's first objective is to clearly explain the technical factors of the incident to the client.

Then to the triers of fact:[3]

> The testifying engineer's goal is to explain the broader concepts and the details of a particular system or behavior, in a way that may allow the triers of fact to adequately understand the essentials of the physical system. Further the engineer's goal is to clearly describe the investigative and analytical methods that were used, the reasons those methods were selected, and the basis for his or her opinions, within the investigative scope of the case.

Now if you, the savvy defense lawyer, predicted a discussion of the Federal Rules of Evidence and classic case law regarding expert testimony is coming next, you'd be right! Mostly. Like the movie, these topics have been dissected and discussed ad nauseum and a further analysis is beyond the scope of this writing. As such, they are mentioned here to set the context for why a forensic engineer should care to strive for engineering certainty. As the forensic engineer's work is nearly always performed under the auspice of potentially having to provide testimony to the nature of and conclusions from the investigation, Rule 702[4] provides a tidy summation of the desired context. The Rule allows that a witness qualified as an expert can testify via opinion to the conclusions of an investigation if:

a. The expert's scientific[5] knowledge has relevance to the case that will help the trier of fact understand the evidence or determine a fact in issue;
b. The testimony is based on sufficient facts or data;
c. The testimony is the product of reliable principles and methods; and

Continued on page 50

R&D
STRATEGIC SOLUTIONS

LEADERS IN TRIAL AND STRATEGIC LITIGATION CONSULTING

Our exceptional services deliver the R&D advantage throughout the litigation process:

- Focus Groups and Mock Trials
- Case Consultation
- Witness Preparation
- Online Jury Research
- Shadow Juries
- In-Court Jury Selection Assistance
- Post-Trial Juror Interviews
- Customized CLE Programs to Law Firms and Legal Organizations

Contact info:
Rick R. Fuentes, Ph.D. | R&D Strategic Solutions | Rfuentes@RD-SS.com | 770-392-1361
4780 Ashford Dunwoody Road | Suite A, #465 | Atlanta, GA 30338-5504 | www.RD-SS.com

Dr. Fuentes is a founding partner of R&D Strategic Solutions, LLC. He has specialized in jury behavior and decision-making and the evaluation of complex evidence for more than 25 years.

Appellate Case Law Update

By Mark W. Wortham
Hall Booth Smith, Atlanta

CONTRACT: SETTLEMENT AND EVIDENCE

***Stephens v. Castano-Castano*, 346 Ga. App. 284 (2018)** Bethel, J.; Phipps, J. concurs, Ellington, P.J. concurred in the judgment (physical precedent only).

This simple car wreck between Mr. Stephens and Ms. Castano provides direction when the parties are negotiating settlement, whether an attorney's referral to a medical provider is admissible, and the financial interest of a physician who has a lien on a plaintiff's recovery. The Court declined to find: (1) that the trial court committed error when it denied the defendant's motion to enforce the settlement agreement; and (2) when it excluded evidence that Castano's attorney referred her to the treating physician. Further, the Court held defendant Stephens should have been permitted to introduce evidence of the treating physician's financial interest in the case.

On the issue of the motion to enforce the settlement agreement, the Court recited the following facts: On September 3, 2013 plaintiff's counsel sent a settlement demand for $25,000 with conditions as to insurance limits, a limited release and that the demand would be withdrawn within 30 days. Twenty days later, the insurance adjuster spoke to plaintiff's counsel, stating that the insurer would pay its limits; she would work on the limited release; was determining if the defendant had additional insurance; and could not send a check until her counsel advised she could. Plaintiff's counsel stated he would wait. Two months after the demand, defense counsel contacted Castano's counsel to facilitate the matter. The lawyers discussed payment instructions and liens and Medicare. One week later, Castano's lawyer sent a letter to defense counsel that the insurer had failed to respond to the demand and any payment was rejected. Two weeks later defense counsel tendered the $25,000, but plaintiff rejected the tender.

Defendant Stephens first argued that the trial court should have considered parol evidence—the communications between the parties and the insurer—to explain the ambiguities. However, the Court of Appeals found there was no timely acceptance and no counter offer that was accepted. And, as there was an essential element missing from the November counter-offer, "Parol cannot supply the deficiency of the missing essential element." The Court also held that any ambiguity in the emails between the parties, could not be resolved by the jury as "the issue of contract construction is at the outset a question of law for the court."

Thereafter, the Court took up the issue of the financial interest of Dr. James L. Chappuis. Plaintiff sought to introduce evidence that the doctor had a lien on any recovery. The trial court disagreed, finding the plaintiff had a debt, despite the outcome of the case. The Court of Appeals first found that there was no collateral source problem as there was "no receipt of benefit or mitigation of loss." The Court then held that Dr. Chappuis "had a financial motivation to testify favorably for Castano, and the probative value of this testimony outweighs its prejudicial." Lastly, the Court found that under the facts of this case, the trial court did not err in finding that the jury should not hear testimony that the attorney was referred to Dr. Chappuis by her lawyer.

AMENDMENTS: RELATION BACK AND STATUTE OF LIMITATIONS

***Tenant Healthsystem GB, Inc v. Thomas*, 304 Ga. 86 (2018)** Hines, C.J., Melton, P.J., Benham, Hunstein, Nahmias, Blackwell, Boggs, Grant, JJ., and Judge Dean Carlos Bucci concur. Peterson, J., not participating.

Plaintiff Thomas was involved in a motor vehicle accident. She was treated in the emergency room and released. When released, her C-collar was removed. While on the hospital's property waiting for a ride home, she became unresponsive. She was rushed back into the hospital. It was discovered that she had a cervical spine fracture that became dislocated causing quadriplegia. Plaintiff filed suit and approximately one year later amended her compliant with additional claims. Thereafter the defendant hospital filed a motion to dismiss.

Plaintiff filed her Second Amended Complaint, asserting new claims against Atlanta Medical Center for imputed simple negligence for the actions of the nursing staff, negligent credentialing and negligent failure to train. The Fulton Superior Court Judge Alford J. Dempsey, Jr., granted hospital's motion to dismiss the new simple negligence count against it. The hospital moved for dismissal of the Second Amended Complaint, contending that these new claims did not relate back to the filing of the original Complaint, and were barred by the two-year statute of

Continued on page 54

Auto Liability Case Law Update

By Rachel E. Reed
Mabry & McClelland, Atlanta

***Ruth et al. v. Cherokee Funding, LLC et al,* 342 Ga. App. 404 (802 SE2d 865) (2017)**

On October 22, 2018, the Supreme Court of Georgia upheld the Court of Appeals ruling in *Ruth et al. v. Cherokee Funding* The Court specifically held that the Industrial Loan Act and the Payday Lending Act[1] do not apply to transactions in which a plaintiff procures financing from a third-party entity during a personal injury suit.

In that matter, the plaintiffs, Ronald Ruth and Kimberly Ogelsby, were involved in a motor vehicle accident and retained attorney Michael Hostilo to represent them. During the course of their lawsuit, the plaintiffs obtained funding from Cherokee Funding LLC entities, which someone at the Hostilo firm secured on their behalf. The agreement included the following terms: if the plaintiffs' lawsuit were unsuccessful and recovered nothing, they would not have to repay the original amount procured; however, if the plaintiffs were successful, they would have to repay the original amount, 4.99 percent interest per month, along with other fees. The agreement also provided that if the plaintiffs terminated Hostilo and retained a different attorney, they would owe Cherokee Funding liquidated damages.

In 2012, Ruth obtained a loan from Cherokee Funding for $5,550 that was disbursed in installments over the course of a year and a half. Cherokee Funding also assumed another funding agreement for $2,500 that Ruth had previously executed. In 2016, Ruth settled his lawsuit for an undisclosed amount, but owed Cherokee Funding, LLC more than $84,000.

In 2013, someone at the Hostilo firm signed a cash advance for Ogelsby for $400. Approximately, one year later, Ogelsby settled her lawsuit, and the Hostilo firm repaid Cherokee Funding, LLC $1,000.

Ruth and Ogelsby then filed suit against Cherokee Funding alleging violations of the Industrial Loan Act and the Payday Lending Act. Cherokee Funding, LLC then filed a motion to dismiss the lawsuit under O.C.G.A. 9-11-12 (b)(6), arguing that neither statute applied. The trial court granted the motion and issued a certificate of immediate review.

The Court of Appeals held that neither statute applied since an agreement that articulates an uncertain/contingent repayment obligation was not considered a loan but was considered an "investment contract."

The Supreme Court concurred, holding that when the terms for repayment are limited/contingent, then there is no "loan" under the Industrial Loan Act. The Supreme Court reached the same outcome as to the Payday Lending Act. The Court finally noted that plaintiffs can often find themselves in "circumstances that leave them vulnerable to exploitation by unscrupulous lenders" and would fall into the same category of people that usury law attempts to protect. The Supreme Court pointed to the General Assembly to strengthen usury laws to protect parties in similar circumstances.

Endnote

[1] It should be noted that the "Payday Lending Act" does not appear in the Georgia Code and serves as a shorthand for a broader range of lending practices.

Business and Commercial Litigation Case Law Update

By Duke R. Groover
James Bates Brannan Groover, Macon

Business entities do not have the "cognizant ability to experience emotions."[1] However, Georgia courts have never addressed whether this maxim applies to intentional infliction of emotional distress claims. With the "legal fiction of corporate personhood," it is not as intuitive as one might expect.[2] As a matter of first impression, the Georgia Court of Appeals in *Osprey Cove Real Estate, LLC v. Towerview Construction, LLC* distinguished between emotional distress claims available to an individual and those available to a corporation, despite the fact that the court has previously allowed corporations to pursue claims based on human emotions.[3]

The United States Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*[4] contributed to the body of law that corporations receive the same constitutional and statutory rights as individuals by defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies."[5] Similarly, in Georgia, the Court of Appeals held that a limited liability company could experience "discomfort and annoyance" in a nuisance case.[6]

If a business entity can experience "discomfort and annoyance," then why can a business entity not experience emotional distress? The elements of intentional infliction of emotional distress are: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe.[7] Similarly, the elements for negligent infliction of emotional distress include: (1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff's mental suffering or emotional distress.[8]

Both intentional and negligent infliction of emotional distress require the plaintiff to experience "emotional distress." In *Lampliter Dinner Theater v. Liberty Mut. Ins. Co.*,[9] the Eleventh Circuit held, under Alabama's then newly-recognized outrageous conduct tort, that "corporations cannot experience emotional distress and cannot therefore maintain a suit for outrageous conduct."[10] While it seems obvious that corporations experience no emotions, the Georgia Court of Appeals had to address the emotional capacity of corporations under the frameworks of intentional and negligent infliction of emotional distress.

In *Osprey Cove Real Estate, LLC v. Towerview Construction, LLC*, the Georgia Court of Appeals adopted the language of the Tenth Circuit and held that a business entity "lack[s] 'the cognizant ability to experience emotions.'"[11] Towerview Construction and Osprey Cove executed four construction loan agreements to develop residential lots that deeded the lots to Towerview as owner and general contractor.[12] Osprey Cove acted as mortgagee and provided a construction loan and a lot loan for each lot to Towerview.[13]

The contractual relationship took a turn for the worse when Osprey Cove allegedly interfered with Towerview's ability to sell the lots and complete the project. Towerview alleged that Osprey Cove's actions "severely interfered with the working relationship between [Towerview] and its subcontractors," the provisions of the contract were internally inconsistent, Osprey Cove never intended to convey the full property rights to Towerview, and that Osprey Cove intentionally interfered with Towerview's subcontractors to trigger the default provisions of the loans.[14]

Towerview filed a complaint stating fourteen separate causes of action, including intentional infliction of emotional distress, arising out of the development of the four residential lots in the Superior Court of Camden County. Osprey Cove filed a motion to dismiss the complaint for failure to state a claim, or, in the alternative, a more definite statement targeting eight of the causes of action.[15] The Superior Court denied Osprey Cove's motion, but the Court of Appeals granted Osprey Cove's application for discretionary appeal.[16]

On appeal, the Court of Appeals agreed with Osprey Cove's assertion that, as a business entity, Towerview is unable to suffer emotional distress.[17] However, neither party identified any Georgia authority on point. Therefore, the court turned to non-binding, persuasive authority to determine the matter of first impression.[18]

The Court of Appeals held that "business entities, including limited liability companies, cannot recover on claims of intentional or negligent infliction of emotional distress as a matter of law" and that the trial court erred in denying Osprey Cove's motion to dismiss Tow-

erview's claim for intentional infliction of emotional distress.[19] Adopting the Tenth Circuit language in interpreting Oklahoma state law, the court reasoned that a business entity lacks "the cognizant ability to experience emotions."[20] While not surprising given the Eleventh Circuit determination in *Lampliter*, the *Osprey* decision leaves no room for ambiguity that in Georgia at least, business entities have no feelings.◆

Endnotes

[1] *Osprey Cove Real Estate, LLC v. Towerview Constr, LLC*, 343 Ga. App. 436 (2017).

[2] *Barreca v. Nickolas*, 683 N.W. 2d 111, 124 (III) (B) (Iowa 2004).

[3] *Compare Osprey Cove*, 343 Ga. App. at 436; *with Oglethorpe Power Co. v. Estate of Forrister*, 332 Ga. App. 693, 707-12 (2015).

[4] 134 S. Ct. 2751 (2014).

[5] *Id.* at 2755; Dictionary Act of 1947, Pub. L. No. 388-278, § 1, 61 Stat. 633, 633 (codified at 1 U.S.C. § 1 (2012)).

[6] *Oglethorpe Power*, 332 Ga. App. at 707-12.

[7] *Standard v. Falstad*, 334 Ga. App. 444 (2015). *See Kaiser v. Tara Ford, Inc.*, 248 Ga. App. 481, 488 (2001) (defining "extreme and outrageous" as "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society").

[8] *Reid v. Waste Indus. USA, Inc.*, 345 Ga. App. 236, 243 (2018).

[9] 792 F.2d 1036 (11th Cir. 1986).

[10] *Id.* at 1038 n.2; *Osprey Cove*, 343 Ga. App. at 429.

[11] *Osprey Cove*, 343 Ga. App. at 440.

[12] *Id.* at 437.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 436. Towerview alleged fourteen separate causes of action, including fraud and deceit, unjust enrichment, breach of contract, and intentional infliction of emotional distress. *Id.*

[16] *Id.*

[17] *Id.* at 429.

[18] *See id.* at 439-40; *FDIC v. Hulsey*, 22 F.3d 1472 (10th Cir. 1994); *HM Hotel Props. v. Peerless Indem. Ins. Co.*, 874 F.Supp.2d 850 (D. Ariz. 2012); *TekDoc Serv., LLC v. 3i-Infotech, Inc.*, No. 09-6573 (MLC), 2012 WL 3560794 (D.N.J. Aug. 16, 2012); *Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004).

[19] *Osprey Cove*, 343 Ga. App. at 440. Note that the court did not decide whether claims for the intentional or negligent infliction of emotional distress might accrue to individual members of a limited liability company because no such claims were raised. *Id.*at 440 n.3.

Trial & Mediation Academy Continues to Train Leading Litigators


1


2


3

Lawyers from across the state made the annual trek to Callaway Gardens for the Melburne D. "Mac" McLendon Trial & Mediation Academy from August 1-4, 2018. This year's edition was shifted to the summer after being snowed out in January.

The conference again kicked off with a welcome reception for faculty and students to gather informally on Wednesday evening, before the seminar commenced the next morning.

Students were guided through the two-and-a-half day experience by a distinguished faculty led by Chair Carrie L. Christie, Rutherford & Christie, Atlanta; GDLA Past President Jerry A. Buchanan of The Buchanan Firm, Columbus; William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; Anne D. Gower, Gower Wooten & Darneille, Atlanta; William D. "Billy" Harrison of Mozley Finlayson & Loggins, Atlanta; C. Bradford "Brad" Marsh of Swift Currie McGhee & Hiers; and GDLA President Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; Jeffrey S. "Jeff" Ward, Drew Eckl & Farnham, Brunswick; and Richard H. "Dick" Willis, Bowman and Brooke, Columbia, S.C.

Four GDLA Platinum Sponsors also participated: Tom Harper of BAY Mediation and Kay Thompson of Miles Mediation comprised a mediation panel along with Bill Wright of Ringler, who offered insights on structured settlements. Maithilee Pathak of R&D Strategic Solutions not only taught the portion on voir dire, but also offered tips on each aspect of a trial as the seminar progressed.

Trial & Mediation Academy employs a modified mock trial format to teach litigation skills. In advance of the seminar, students are given a case to study and begin preparing aspects of the trial. Following faculty instruction and demonstrations, students dispersed into breakout groups to work on their skills from opening statements to cross and direct examinations to closing.

The first day concluded with a reception and dinner, featuring a keynote address on professionalism by Fulton State Court Judge Susan B. Edlein. She joined the group again on Friday to discuss ethics.

Save the date for the next Academy set for August 7-10, 2019 at Callaway. It is an exceptional learning opportunity not only for those early in their careers, but also for experienced attorneys who find themselves needing to brush up on their courtroom skills. Students could repeat the program each year and undoubtedly learn something new. Even the faculty professes to gain new trial tips and strategies every time—and some have been teaching for over 20 years. ◆

Pictured are: 1. Academy Chair Carrie Christie; 2. Camile Hart, Mercedes Ordonez, Cheryl Tomlinson, Jordan Raymond, and Virginia Josey; 3. Barret Kirbo; 4. Daveed Lift, Jena Emory, Morgan Carrin, Tommy Johnson, and Trent Edwards; 5. Faculty member Dick Willis; 6. Executive Director Jennifer Davis, faculty member Anne Gower, Fulton State Court Judge Susan Edlein, and Academy Chair Carrie Christie; 7. faculty member Matt Moffett 8. Academy Vice-chair Brad Marsh; 9. Sam Weaver, faculty member Jerry Buchanan, Spencer Brown, and Carter Weathington; 10. Ross Bundschuh; 11. R&D's Maithilee Pathak; 12. Garrett Murphy; 13. faculty member Jeff Ward; 14. Ringler's Bill Wright, BAY's Tom Harper, and Miles' Kay Thompson.

GDLA Co-Sponsors Gate City/GABWA Judicial Reception

In an ongoing effort to promote diversity within our association and the bar generally, GDLA was again pleased to be among the bar associations co-sponsoring the Annual Judicial Reception of the Gate City Bar Association and Georgia Association of Black Women Attorneys (GABWA). The event was held on August 21, 2018, at King & Spalding in Atlanta.

Pictured enjoying the reception are: 1. Crystal McElrath, Shontell Powell, and Court of Appeals Judge Elizabeth Gobeil; 2. Eleventh Circuit Court of Appeals Judge Britt Grant and GDLA Executive Director Jennifer Davis; 3. GDLA Past President Lynn Roberson with her husband, Fulton Superior Court Judge Henry Newkirk, and DeKalb State Court Judges Stacey Hydrick and Janis Gordon; 4. Jay Doyle and Cobb Superior Court Judge Rob Leonard; 5. Fulton Superior Court Chief Judge Robert McBurney, Harold Franklin, and Supreme Court Chief Justice Harold Melton.

Your Single Source Solution

DEPOSITION SERVICES
One-Call & Worldwide Scheduling

LITIGATION PSYCHOLOGY
Mock Trials & Witness Training

RECORDS RETRIEVAL
Records & Documents

PRESENTATION TECHNOLOGY
Trial Boards & Graphic Design

COURTROOMSCIENCESINC

WWW.COURTROOMSCIENCES.COM

POSITIVE OUTCOMES ARE NO ACCIDENT. INVOLVE CSI TODAY.

1-877-784-0004

courtroomsciences.com

GDLA held its 51st Annual Meeting at Hammock Beach Resort in Palm Coast, Fla., June14-17, 2018

Events began on Thursday evening with the Welcome, Y'all Reception sponsored by BAY Mediation & Arbitration. Friday and Saturday mornings were marked by continuing legal education presentations as planned by Program Chair and (President-Elect Hall F. McKinley, III. Friday evening was the President's Reception, honoring outgoing President Sally Akins for her service; it was sponsored by Veritext. FORCON sponsored the closing reception and dinner, which was held on the Ocean Lawn overlooking the Atlantic.

During the Business Meeting on Saturday, a proposed amendment to Bylaw Article VII, Section 2 passed. It followed action taken at last year's Annual Meeting, during which the membership approved a Bylaws change to increase the number of At-Large Board of Directors members from three to no more than six. The amendment corrects the quorum requirements to comport with the Board's augmented size.

Next, GDLA members unanimously accepted the report of the Nominating Committee electing the 2018-2019 officers and Board of Directors (see page 39). Hall F. McKinley, III of Drew Eckl & Farnham in Atlanta took the reins as GDLA President after he and the officers were sworn-in by Fulton State Court Judge Wes Tailor.

Also on Saturday, Past President Jerry A. Buchanan of The Buchanan Firm in Columbus received the second GDLA Distinguished Service Award. Outgoing President Sally Akins also presented Jeffrey S. "Jeff" Ward with the President's Award. See page 39 for more details.

The following pages showcase highlights from the conference. Mark your calendar for the 52nd GDLA Annual Meeting set for June 6-9, 2019 at the Ponte Vedra Inn & Club in Ponte Vedra, Fla. ◆


1


2


3

Pictured at the Welcome, Y'all! Opening Reception on Thursday evening, sponsored by BAY Mediation & Arbitration Services *(L-R): 1. President-Elect Hall McKinley, Tom Sippel, John and Diane Campbell; 2. President Sally Akins, BAY's Michaela and Scott Young, and Robert Luskin; 3. Past Presidents Warner Fox, Ted Freeman, Jerry Buchanan, and Bubba Hughes; 4. The gang's all here from Macon; 5. Husband and wife members Karen and Mike St. Amand with Natalie Wilkes; 6. Marty Levinson with his wife, Cathi, and kids, Zach and Lexi (and baby Lucas, who was still in Mommy's tummy); 7. Scott Kerew (left) with Jim Hollis and his family—wife, Courtney, and daughters, Mary and Anna.*

WELCOME, Y'ALL!
OPENING RECEPTION

Participating Sponsor
BAY Mediation & Arbitration

51st GDLA Annual Meeting: Welcome, Y'all! Reception

Photos from the Welcome, Y'all Opening Reception on Thursday evening, continued from previous page. *Pictured are (L-R): 1. husband and wife members Catherine (left) and Cam (right) Bowman and their kids, Sarah and Hunter; 8. Joe Stephens with his wife, Christina, and their children David and Anna Jane; 9. Bruce Edenfield and Past President Staten Bitting; 10. husband and wife members Sam Hughes and Kim Roeder with Donovan Potter, Ann Cox Mandel and her husband, Daniel.*

Congrats, officers!

GDLA President Hall McKinley is pictured below and alongside his fellow officers during the photo shoot for this magazine's cover. From left to right are Secretary George Hall, President-Elect Dave Nelson, President McKinley, and Treasurer Jeff Ward. (Photos by A.J. Neste Photography)

National Presence. Local Expertise.

At U.S. Legal Support, we believe in providing personalized services tailored to fit the needs of our clients. As one of the largest full service legal support companies in the nation, we provide local specialists with national resources.

Contact us to learn more about our custom solutions.

Over 75 Offices Serving You Nationwide

404.381.1465

Download on the App Store

ANDROID APP ON Google play

Download the USLS Mobile App

www.uslegalsupport.com

US LEGAL SUPPORT

2016 BEST OF THE NATIONAL LAW JOURNAL

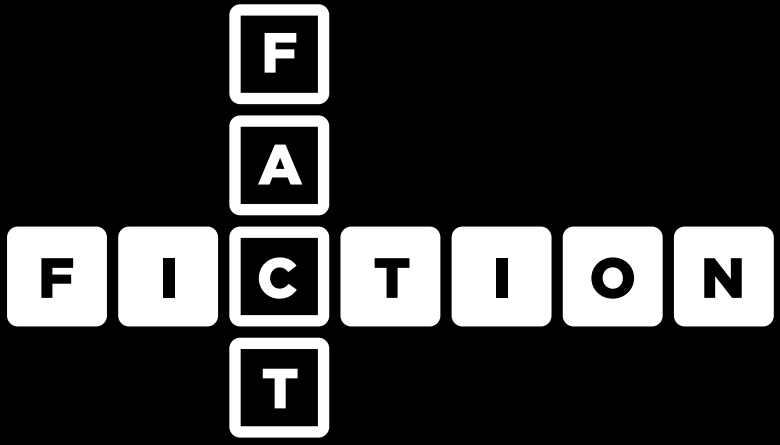
Winner | U.S. Legal Support | Court Reporting & Deposition Service Provider

The Power of Commitment™

Court Reporting | Record Retrieval | eDiscovery | Trial Services

51st GDLA Annual Meeting: Educational Program

1. Friday and Saturday mornings are reserved for the educational programming, while GDLA's Gold and Platinum Sponsors showcase their offerings in the exhibit hall; 2. Jeff Ward led a mediation discussion that included panelists Alycen Moss, Tracy O'Connell, Beth Boone, Henning Mediation's Tony DelCampo, Miles Mediation's Lynn Roberson and BAY Mediation's Scott Young; 3. Special guest Brett Ross, a defense lawyer in Alabama, and Rimkus' Mike Urban presented on autonomous cars (see article on page 14); 4. Marty Levinson; 5. Jim Hollis led a panel exploring the preservation of both evidence and privilege during investigations, which featured 6. Ashley Broach, 7. Scott Kerew and 8. Righton Johnson; 19. Candis Jones and Donovan Potter; 10. George Hall and John Campbell; 11. Sean Hynes, Alycen Moss and Shane Keith.



Separating fact from fiction.

As one of the top forensic accounting firms in the state of Georgia, MDD regularly provides litigation support services and expert witness testimony in courts, arbitrations and mediations. All of the Atlanta partners are Certified Public Accountants, have testified at trial and have years of experience working in the litigation arena.

Our expertise includes:

> Business Valuations
> Business & Shareholder Disputes
> Class Action Certifications/Damages
> Construction Disputes
> Divorce Matters
> Employment Litigation
> Fraud/Ponzi Investigations
> Intellectual Property/Patent Infringement
> Lost Profits
> Personal Injury/Wrongful Death

To learn more about our litigation expertise, please visit us at mdd.com or contact us today:

Dayne Grey, CPA | Partner | dgrey@mdd.com
Neal Cason, CPA, CFE | Partner | ncason@mdd.com
Travis Williams, CPA | Partner | twilliams@mdd.com

T 404.252.0085

MDD
FORENSIC ACCOUNTANTS

Making Numbers Make Sense

AUSTRALIA • BRAZIL • CANADA • HONG KONG • JAPAN • NEW ZEALAND • SINGAPORE
THAILAND • UNITED ARAB EMIRATES • UNITED KINGDOM • UNITED STATES

> mdd.com

51st GDLA Annual Meeting: President's Reception

PRESIDENT'S RECEPTION

Participating Sponsor
Veritext

Pictured at the President's Reception on Friday evening, sponsored by Veritext *are (L-R unless otherwise noted): 1. Scott and Lauryn Masterson with Fulton State Court Judge Wes Tailor, his wife, Jaime Theriot and son, Colt; 2. Tracie Macke and President Sally Akins; 3. Matt and Lisa Higgins with Christina Jay and Jason Fisher; 4. Nicole Leet (center) with Tom Towey (left) and John Woody of Veritext, the evening's sponsor; 5. Incoming President Hall McKinley congratulates outgoing President Sally Akins on her year of service; 6. Robert Luskin with Jim Cook and his wife, Debbie.*

VERITEXT OFFERS **SEAMLESS COVERAGE**, WITH MORE THAN **50 LOCATIONS NATIONWIDE**, AND **LEADING-EDGE TECHNOLOGIES** THAT KEEP YOU CONNECTED.

PROFESSIONAL SERVICE.
With a pool of more than 9000 professionals, Veritext has the largest selection of high quality reporters and videographers in the industry.

ADVANCED TECHNOLOGY.
Streamline the deposition process and manage your most complex cases with the advanced tools in video, remote depositions, exhibit management, videoconferencing and workflow services.

DATA SECURITY.
As a HIPAA, PII and SSAE 16 compliant company, we ensure your data is physically and electronically protected.

COURT REPORTING • VIDEOGRAPHY • VIDEOCONFERENCING • REMOTE DEPOSITIONS • ONLINE REPOSITORIES • EXHIBIT SOLUTIONS • DATA SECURITY

VERITEXT LEGAL SOLUTIONS

Schedule a court reporter:
(770) 343-9696
calendar-ga@veritext.com
www.veritext.com/atlanta

2016 BEST OF THE NATIONAL LAW JOURNAL
Court Reporting & Deposition Service Provider

DAILY REPORT BEST OF 2017 WINNER
COURT REPORTING & DEPOSITION SERVICE PROVIDER
VERITEXT LEGAL SOLUTIONS

51st GDLA Annual Meeting: Business Meeting and CLE

Pictured are during Saturday's educational program and business meeting *are (L-R): 1. Fulton State Court Judge Wes Tailor (right) swears in the new officers—Secretary George Hall, Treasurer Jeff Ward, President-Elect Dave Nelson, and President Hall McKinley; 2. Christina Jay, Hillary Shawkat and Judge Tailor (Christina once clerked for him); 3.Sean Hynes; 4. Jeff Wasick (second from right) assembled a panel to discuss apportionment, including Sean Hynes, Nicole Leet, and Marty Levinson; 5. Incoming President Hall McKinley presents outgoing President Sally Akins with a gavel plaque and the traditional mint julep cup; 6. Shane Keith and Judge Tailor entertain the crowd with a professionalism presentation; 7. Past President Jerry Buchanan with DRI Secretary-Treasurer and GDLA member Douglas Burrell; 8. Mike Athans, Robert Luskin, and Jamie Weston discussed the #MeToo movement's impact on the defense bar; and 9. Nicole Leet.*

51st GDLA Annual Meeting: Awards Presentation

Jerry A. Buchanan (above left), who served as GDLA President from 2002-2003, was honored with the inaugural GDLA Distinguished Service Award during the 51st Annual Meeting at Hammock Beach Resort on June 16, 2018. As Past President Matt Moffett said, "Leader, teacher, and mentor—three words that describe our friend, known to all as "Jerry B," who is most deserving of GDLA's highest award." He is still active at our Board of Directors meetings and has been on the faculty of Trial & Mediation Academy for over 25 years. Matt continued, "Watching a 'Buchanan examination' there is like watching an artist create a masterpiece." Jerry practices at The Buchanan Law Firm in Columbus. He is pictured with outgoing President Sally Akins.

Jeffrey S. "Jeff" Ward (see photo at right) was honored by President Sally Akins with the President's Award for his dedication to the Association while serving three years as editor-in-chief of this magazine, *Georgia Defense Lawyer*. During his tenure, GDLA was twice presented the Best Newsletter Award for local and voluntary bars by the State Bar of Georgia. Jeff practices with Drew Eckl & Farnham in Brunswick. ◆

2018-2019 Officers and Board of Directors

OFFICERS

President
Hall F. McKinley, III,
Drew Eckl & Farnham, Atlanta

President-Elect
David N. "Dave" Nelson,
Chambless Higdon Richardson Katz & Griggs, Macon

Treasurer
Jeffrey S. "Jeff" Ward,
Drew Eckl & Farnham, Brunswick

Secretary
George R. Hall,
Hull Barrett, Augusta

Executive Committee:
(includes the officers and three most recent past presidents)

Immediate Past President:
Sarah B. "Sally" Akins,
Ellis Painter Ratterree & Adams, Savannah

Past President 2016-2017:
Peter D. Muller, *Goodman McGuffey, Savannah*

Past President 2015-2016:
Matthew G. Moffett,
Gray Rust St. Amand Moffett & Brieske, Atlanta

VICE PRESIDENTS
James D. "Dart" Meadows,
Balch & Bingham, Atlanta

Pamela Lee, *Swift Currie McGhee & Hiers, Atlanta*

William T. "Bill" Casey, Jr.,
Swift Currie McGhee & Hiers, Atlanta

James S.V. Weston,
Trotter Jones, Augusta

DIRECTORS

Northern District
Ashley Rice (2019),
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Martin A. "Marty" Levinson (2020), *Hawkins Parnell Thackston & Young, Atlanta*

Candis Jones (2021),
Lewis Brisbois Bisgaard & Smith, Atlanta

Middle District
C. Jason Willcox (2019),
Moore Clarke DuVall & Rodgers, Albany

Jason D. Lewis (2020),
Chambless Higdon Richardson Katz & Griggs, Macon

Jason C. Logan (2021),
Constangy Brooks Smith & Prophete, Macon

Southern District
M. Beth Boone (2019),
Hall Booth Smith, Brunswick

James W. "Jim" Purcell (2020),
Fulcher Hagler, Augusta

Tracie Grove Macke (2021),
Brennan Wasden & Painter, Savannah

State-at-Large (one-year terms)
Daniel C. "Dan" Hoffman,
Young Thagard Hoffman Smith & Lawrence, Valdosta

Zach Matthews, *McMickle Kurey & Branch, Alpharetta*

Garret W. Meader
Drew Eckl & Farnham, Brunswick

Erica L. Morton,
Swift Currie McGhee & Hiers, Atlanta

Tracy O'Connell
Ellis Painter Ratterree & Adams, Savannah

Joseph D. "Joe" Stephens,
Cowsert Heath, Athens

51st GDLA Annual Meeting: Fun in the Sun


1


2


3


4

5


6

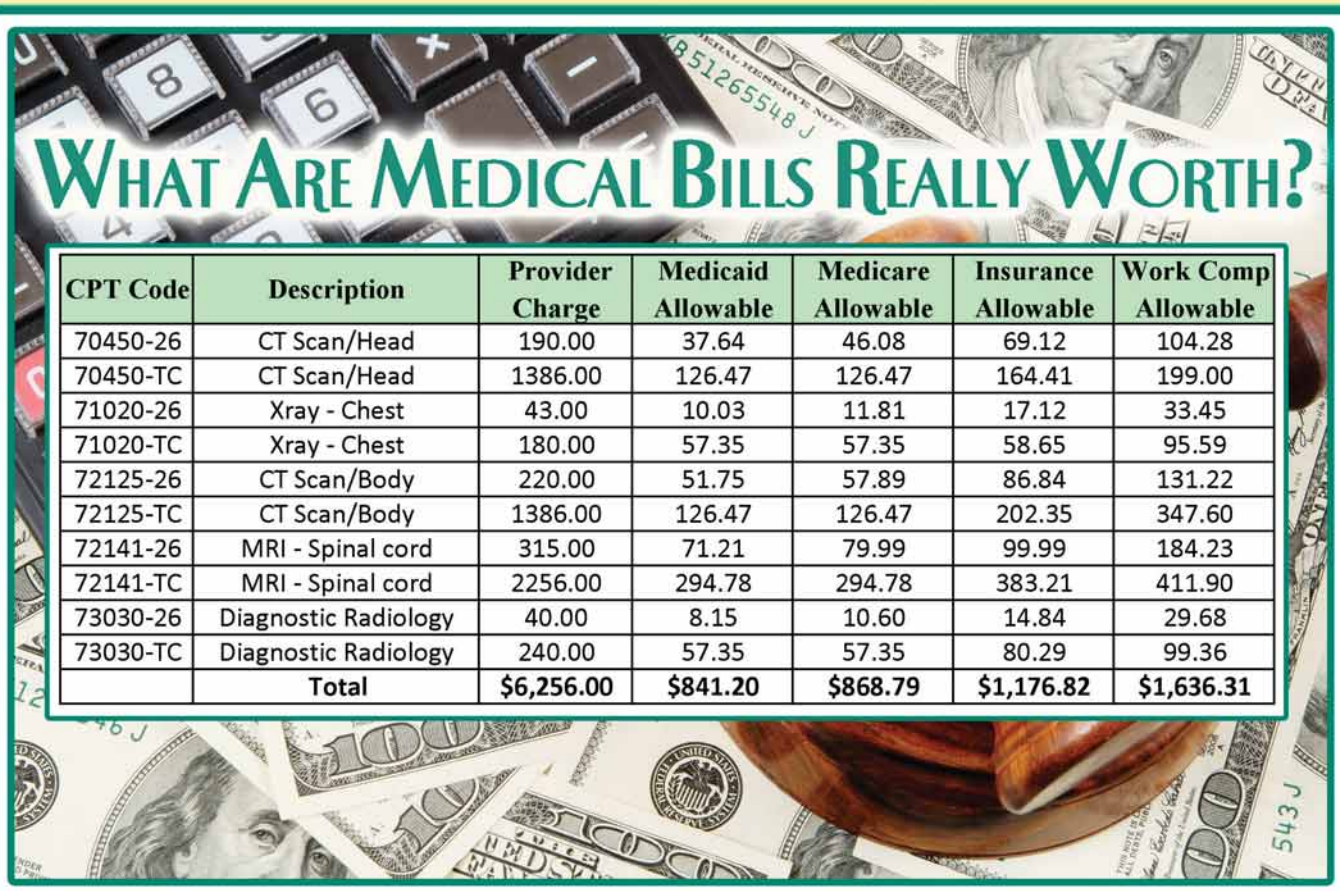
Friday and Saturday afternoons were spent enjoying fun in the sun and the shade, thanks to bungalows by the pool and refreshments sponsored by Collision Specialists and ESI. *Pictured are (L-R): 1. Ann Cox Mandel, her husband, Daniel, and their daughters, Ansley and Susanna; 2. Marty Levinson and his daughter, Lexi, competed in the sandcastles tournament; 3. Elizabeth Stell with her son, Jackson, and husband, Seko Saydar; 5. Past President Warner Fox and his wife, Pat; 5. Garret Meader; 6. Christy Horne James and her husband, Baxter.*

7. Will Martin, Donovan Potter, and Marty Levinson; 8. President Hall McKinley (left) with Past President Matt Moffett and his wife, Diane; 9. Jeff Wasick (kneeling) with his wife, Georganne, and daughters, Kate, Claire and Phoebe; 10. Shane Keith with his kids, Landon and Tanner; 11. Pamela Lee, Candis Jones, ESI's Heather Slatton; Kim Roeder, and Collision Specialists' Analiese Stopek; 12. Garret Meader's daughters and friend took the sandcastles top prize.

POOLSIDE BUNGALOWS

PARTICIPATING SPONSORS

Collision Specialists and ESI



What Are Medical Bills Really Worth?

CPT Code	Description	Provider Charge	Medicaid Allowable	Medicare Allowable	Insurance Allowable	Work Comp Allowable
70450-26	CT Scan/Head	190.00	37.64	46.08	69.12	104.28
70450-TC	CT Scan/Head	1386.00	126.47	126.47	164.41	199.00
71020-26	Xray - Chest	43.00	10.03	11.81	17.12	33.45
71020-TC	Xray - Chest	180.00	57.35	57.35	58.65	95.59
72125-26	CT Scan/Body	220.00	51.75	57.89	86.84	131.22
72125-TC	CT Scan/Body	1386.00	126.47	126.47	202.35	347.60
72141-26	MRI - Spinal cord	315.00	71.21	79.99	99.99	184.23
72141-TC	MRI - Spinal cord	2256.00	294.78	294.78	383.21	411.90
73030-26	Diagnostic Radiology	40.00	8.15	10.60	14.84	29.68
73030-TC	Diagnostic Radiology	240.00	57.35	57.35	80.29	99.36
	Total	**$6,256.00**	**$841.20**	**$868.79**	**$1,176.82**	**$1,636.31**

cmb
coastal medical billing

Experts in Medical Billing

912-355-8188

1934 E. Montgomery Crossroads
Savannah, GA 31406

What Are Medical Bills Really Worth?

- What is Charged vs. Market Value of Services
- Expert Witness Testimony Available
- Assistance in Understanding the Medical Billing Process

Will Ronning, J.D., MBA, CHBME
Direct: 912.200.4301
Main: 912.355.8188
wronning@coastmedbill.com

www.coastmedbill.com

51st GDLA Annual Meeting: Closing Reception and Dinner

CLOSING RECEPTION AND DINNER

PARTICIPATING SPONSOR
FORCON International

Pictured at the Closing Reception and Dinner on Saturday evening, sponsored by FORCON *are (L-R unless otherwise noted): 1. Past President Jerry Buchanan, his wife, Carolyn, and their son, BG, with Immediate Past President Sally Akins; 2. Jim Purcell with his wife, Annie (right), and their daughters, Lydia (left) and Mary Helen; 3. Ashley Rice and Elizabeth Stell.*

Save the Date!

52nd GDLA Annual Meeting

June 6-9, 2019

PONTE VEDRA INN & CLUB

Ponte Vedra, Florida

Autonomous Vehicles

Continued from page 14

traffic and environmental conditions, etc.). This is referred to as the V2X (vehicle to everything). Dedicated Short Range Communications (DSRC) is a radio-based communication device that would be installed in vehicles to communicate their location (via GPS coordinate), speed, and heading. This would allow other vehicles to slow down prior to a traffic backup, allow emergency vehicles to communicate to oncoming traffic to stop, provide traffic signals to oncoming traffic or even provide warning that "you aren't making this green, you may as well start slowing down." One of the benefits of the DSRC radios is their relative cost. When compared to lidar and radar systems, DSRC radios are very budget-friendly, at a few hundred dollars. The fall back is, if they aren't used en masse, their benefit is minimal.

Infrastructure radios require government spending, a fact that has killed the dream of transmitting infrastructure data many times before. Currently, GM has been the only OEM willing to make that investment of Vehicle to Vehicle (V2V) communication by making DSRC radios standard in their 2017 Cadillac CTS. This should reduce the number of CTS-on-CTS collisions from nearly zero to virtually zero. We should commend GM for taking the risk and being the first to market with a standard DSRC radio installed in their vehicles. If the rest of the OEMs decide to take the chance and install DSRC radios in their vehicles, the benefits should be noticeable once the equipped vehicles reach about 20 percent of the on-road vehicle population, even without the accompanying investment in infrastructure.

Before we reach our autonomous utopia, where all vehicles are autonomous and vehicle collisions are treated like airplane collisions due to their rarity, how do we deal with autonomous or semi-autonomous vehicles that are involved in crashes now? In Michigan, the traffic crash reports now have line items for "Automation System Level in Vehicle" and if the "Automation System Level Engaged at Time of Crash." Since Michigan is one of the states that allows vehicles to drive autonomously, the changes to their crash report was a necessity. Unfortunately, there is no other entry for which system was active. If the vehicle was a Level 4 or 5 and being tested, there wouldn't be a question. The presumption would be: if it was autonomously driving, all systems were active. What about a level 2 vehicle which may be equipped with a mixed bag of systems? Just to say it was a level 2 vehicle and the system was 'active at time of the collision' is not sufficient. Knowing whether the lane keeping system was active would not necessarily play a part in a pedestrian collision. So the first point would be to document the level of autonomy and which systems were in play in the vehicle.

The Uber collision in Arizona earlier this year has shone a spotlight on the testing of autonomous vehicles. According to a preliminary report issued by the National Transportation Safety Board (NTSB), the facts of the collision are as follows. A pedestrian, dressed in dark clothing, was pushing a bicycle that did not have a front head lamp or side, front, or rear reflectors, in an area where signs were posted for pedestrians to use a crosswalk north of where the accident occurred. The pedestrian did not look in the direction of the vehicle until just before she was struck and her toxicology tested positive for methamphetamine and marijuana.

The Uber vehicle was a 2017 Volvo XC90 that was equipped, by Uber, with a developmental self-driving system consisting of forward and side-facing cameras, radars, lidar, and navigation sensors. The Volvo was equipped, by Volvo, with a collision avoidance function with automatic emergency braking (AEB), driver alertness detection, and road sign information. The Volvo systems were disabled when the test vehicle was operated in computer (self-driving) mode.

The self-driving system first picked up the pedestrian with the radar and lidar systems 6 seconds before the accident (an eternity in accident reconstruction timing). The classification of the pedestrian was varied within those last 6 seconds, from unknown to vehicle to bicycle. At 1.3 seconds before the collision, the system determined emergency braking was needed to mitigate a collision (Side note: 1.3 seconds wasn't enough time for the Volvo to stop from 43 mph). Uber emergency braking maneuvers were not enabled in self-driving mode to reduce the potential for erratic behavior, possibly due to false positives. The vehicle operator was relied on to intervene and take action, though the system was not designed to alert the driver. A video of the driver leading up to the collision showed she was looking down for several seconds prior to the collision.

Without drawing any conclusions from the NTSB report, I would like to ask you, the reader, how much of the above information you knew prior to reading it. My personal recollection of the news coverage was: "Pedestrian was struck by Autonomous Vehicle," followed by "Uber is putting its Autonomous Vehicle Testing on Hold in Arizona," and the "Arizona governor catching heat for allowing these vehicles to be tested on public roads." The self-driving car was demonized, and Uber was blamed for allowing these systems on the road without proper oversight, and before the technology was ready. What wasn't shown on the news, at least none that I've seen or read, was that the system worked better than any human would have at noticing the pedestrian as a potential hazard (six seconds prior), and the system(s) that may have avoided or mitigated the collision was deactivated.

A discussion regarding autonomous vehicles with my mother (a very non-technical person who not only still has a VCR, but one that still flashes 12:00) proved my point that the fear of robot cars is in part due to the information given to the public without knowledge of the cause. I'm not asserting autonomous vehicles are perfect; collisions with autonomous vehicles will still occur. The question is, 'how much better will they need to be than us, before we embrace the autonomous vehicle?'

Tesla has boasted about a 40 percent reduction in airbag deploying collisions in its vehicles since the introduction of its autopilot systems. The Tesla statistic is challenged for its accuracy and the conditions that come with that number. I would argue though, that despite whatever that number is, it can only be a positive number. When used properly, with an attentive driver behind the wheel, these systems are either a) as good as the fallback human driver or b) better than the human driver and take over to avoid collisions when needed. The reason why some of these collisions still occur is that the driver becomes comfortable with the vehicle taking over and disengages himself from the vehicle, relying only on the imperfect system to cover all scenarios. While this may be sufficient 99.9 percent of the time, it's that last 0.1 percent, when a trailer is parked across your path, a pedestrian darts out across the road, or new road conditions call for intervention, where collisions occur. I can't help but notice the similarities between the Uber case (Level 4) and many Tesla (Level 2) crashes. In both scenarios, the back-up system was disabled. In the level 4 vehicle, the AEB was disabled. In some of these Tesla cases, it was the human driver that unplugged himself from the driving task at hand and failed to take over when needed. One could argue that the Uber driver was also unplugged from her overseer task, which I would agree with. However, I also would question whether the Uber collision would have been avoided even with an attentive driver. A dark-clothed pedestrian pushing a bicycle with no reflectors, in a 45 mph speed limit area, at night, in an area unexpected to have a pedestrian, is a troublesome combination for even an alert driver to avoid a collision. ◆

Mike Urban is a mechanical engineer with Rimkus Consulting Group, a GDLA Platinum Sponsor. He has more than 12 years' experience in automotive design, development, testing and evaluation of mechanical and structural automotive systems and forensic evaluation of vehicular collisions and product and material failures. Mr. Urban's forensic experience includes vehicle accident reconstruction for passenger and commercial vehicles, vehicle component failure analysis and insurance fraud/consistency evaluations.

A View from the Mediator

Continued from page 16

uglier the longer they go on.

As previously mentioned, certain types of cases also present circumstances where confidentiality is a critical element for consideration. Many cases involving sexual assault have plaintiffs very interested in maintaining their privacy. I also handled several cases where plaintiffs were suing some employer or insurance company for revealing their HIV status to someone who was not supposed to learn of it. In that circumstance, the mere filing of the lawsuit (or at least trying the case in a public courtroom) defeats the very purpose for the suit.

Mediation can also be used to resolve cases after a verdict. The parties may be concerned about error in the trial and the delay and expense of appeals and be willing then to compromise on the verdict. The winning party may be willing to accept less than the verdict amount if she realizes she may have difficulty holding onto the result through an appeal. The losing party may be willing to pay more now that he knows his defense was not persuasive to the jury.

3. Selection of the mediator may be critical

From my experience as a litigator, a great mediator is one who knows the area of law involved so significant time is not wasted explaining the legal issues in the case. It also helps when one lawyer or the other is trying to make an argument that is really not supported by legal authority. If the mediator is one who is well known as an expert in that field, the mediator can be more effective in explaining why the argument is weak.

A great mediator also keeps abreast of verdicts and legal developments in the relevant jurisdiction so she can effectively engage the parties and lawyers in "reality testing."

A great mediator also understands the importance of empathy for the parties and their counsel, particularly the lay plaintiff. For everyone in the mediation, except for the plaintiff, the process is part of doing business. For the plaintiff it is very personal. The mediation may be his only opportunity to be heard and have his day in court. Thus, the mediator must clearly communicate to the plaintiff that he is being heard and understood. The mediator must also be scrupulously fair-minded. If either party feels the mediator is biased against them, the case will be much more difficult to resolve.

4. Make sure all people needed to resolve the case are present

There is nothing more aggravating than finding out half-way through the mediation that the plaintiff will not agree to anything until her confi-

dant on the phone tells her it is acceptable. The one on the phone knows little about the case, has heard nothing of what has been shared during the mediation, and has opinions about the value of the case based upon little but supposition.

I have had counsel advise me ahead of time that they are having difficulty getting their client to accept their assessment of the case. A good mediator can help lawyers with that issue by backing up the lawyer in the presence of their client, which can go a long way toward getting the client on board.

5. Mediation has resolved cases I thought had no chance of settlement

There is something about the process that brings people together toward resolution. As a litigator I had several cases settle which I was sure had no chance of settlement. And I have seen that same phenomenon at work as a mediator.

6. Mediation permits resolution in ways not available in a civil trial

Usually, civil trials come down to an award of money damages (or not, as the case may be), but no other awards are usually available. But in a private mediation, the parties may seek or propose offers involving more than money. Sometimes an apology may assist in reaching resolution. Sometimes the issue of confidentiality makes the difference. In employment cases, the issues of continued employment or letters of recommendation may be included, or requirements for particular training made mandatory. In premises security cases, the issue of the breaking of the lease may be included in resolution.

Even if dealing only with the payment of money, trial verdicts just permit one lump sum award. When dealing with ongoing lost income or medical bills or injuries to a child, structured settlements can be particularly helpful in reaching a reasonable resolution that insures funds cannot be depleted before the need for them is past.

7. Prepare thoroughly for mediation

The most important item of preparation may be to adequately prepare your client so that they understand the process and either participate in a manner helpful to resolution, or at least, do nothing to sabotage the process.

You need to be the most prepared person in the room. Nothing brings the process to a halt faster than a lawyer making an important argument which she cannot back up with citation to a deposition or report or with case law support.

Mediators and litigators differ on whether and when to present the other side with impeachment material. As an advocate, sometimes I would confront the plaintiff with the damaging information during the opening session. Other times I provided the information to the mediator and trusted him with presenting it to the plaintiff in the most effective manner. As a mediator I have had lawyers do it both ways.

8. Timely share all relevant discovery information

If you want the other side to give consideration to information in their evaluation of the case for mediation, you and your client need to have provided the information to the other side with sufficient time for that information to be duly considered. This can be particularly difficult when a plaintiff presents new medical bills or diagnoses at the mediation, not fully appreciating that the case has been round tabled at the home office and a full evaluation made without consideration of this unknown information, and the home office does not reassess in real time. Sometimes the better practice when this happens is to propose a recess for a few weeks until the new information can be duly considered and new settlement authority obtained.

9. Be patient

Both plaintiffs and defendants can become impatient when they perceive the process as taking too long. This impatience almost always involves the belief that the mediator is taking too long in the other room. Trust your mediator to know how much time she needs to spend explaining the issues to the other side. My perception is that lay plaintiffs take time to come to the realization they will not be taking home a check as large as they had hoped at the beginning of the day. Let them take the time they need to come to terms with that fact or your case will never settle.

10. Be flexible

Be willing to hear the other side's arguments and respond thoughtfully. Be ready to consider and to propose alternative benefits to reach a resolution, such as an apology, a change in company policies and procedures, resolution of employment issues, breaking a lease without penalty, or adding security to the property.

I have had several cases, both as a litigator and as a mediator, where the case has been resolved with the use of a mediator's proposal. Be open to the use of brackets if it appears doing so may break a log jam. ◆

Prior to joining Miles Mediation in September of 2015, Lynn M. Roberson practiced litigation for over 35 years, particularly in the areas of premises liability for violent crime, other premises liability, pharmacy liability, automobile/truck accident cases, products liability, malicious prosecution, and other personal injury law, as well as insurance coverage matters. Ms. Roberson completed over 80 jury trials in these areas as well as over 35 appeals. Ms. Roberson is a past president of the Georgia Defense Lawyers Association as well as the Atlanta Bar Association. She also served as Chair of DRI's section on Trial Tactics. She also has served as the GDLA's State Representative to DRI.

Opening Statements in Mediation

Continued from page 18

may actually learn from your opponent that your client's own evaluation is off the mark. All of these are good reasons to participate, fully, in the advantages provided by an opening statement in mediation.

If, for any reason, you are denied the right to make or hear an opening statement, be sure to spend extra time briefing the mediator on the case. Mediators learn a lot from hearing the openings and observing the parties during those openings. Your preparation of the mediator should provide what the absence of an opening statement omits.

In summary—Don't waste your shot! ◆

Terrence Lee Croft is a founding member of the National Academy of Distinguished Neutrals (NADN), of which the Georgia Academy of Mediators and Arbitrators (GAMA) is a chapter. GAMA is a GDLA Platinum Sponsor. Mr. Croft is a full-time mediator and arbitrator with JAMS, and has resolved more than 3,500 disputes. He was named a Georgia Super Lawyer (Arbitration, Mediation & Civil Litigation) and Atlanta Arbitration Lawyer of the Year 2018 by Best Lawyers in America.

For The Record, Reputation Matters.

COURT REPORTING

VIDEOGRAPHY

VIDEO CONFERENCING

TRIAL PRESENTATION

RECORDS RETRIEVAL

DAILY REPORT'S BEST OF 2015

DAILY REPORT'S BEST OF 2016

Elizabeth Gallo
COURT REPORTING, LLC

Georgia's Best Choice for Court Reporting, Videography, and Video Conferencing

Offering global coverage with a full array of litigation support services including a real-time interactive scheduling calendar and secure online archive. Our HIPAA-trained staff court reporters average 20 years of experience.

PHONE (404) 389-1155
TOLL FREE (866) 689-1837
FAX (866) 870-6032

2900 Chamblee Tucker Road, Building 13
Atlanta, Georgia 30341
WWW.GEORGIAREPORTING.COM

Possible vs. Probable

Continued from page 20

d. The expert has reliably applied the principles and methods to the facts of the case.

It should be immediately apparent that ASTM E2713's section 7.2.2.1 description is strikingly similar to Rule 702. This is deliberate and highlights the fundamental importance of the tests the Rule codifies for the trier of fact to apply to an expert's work. When that expert is an engineer, the opinions offered as testimony will fall within the confines of one, or more, of the engineering disciplines. Points a) through d), then, refer primarily to engineering knowledge, principles, methods, and data and as such, a forensic engineer must be certain the conclusions he or she draws from an investigation rest on a sound engineering basis that has relevance to the trier of fact. If they do not, it is quite possible the engineer will be excluded, in whole or part, from providing testimony in the matter.

Armed now with a general understanding of what engineering certainty is, the question of how one can strive to achieve it is open for discussion. The surest means of creating a foundation of certainty in forensic investigations is to conduct each one from its start by following the scientific method. Having existed as a defined concept in one form or another for hundreds of years, it is the collection of empirical processes that dictate how science-based inquiries are conducted. As defined by the National Fire Protection Association[6], the scientific method is:

> The systematic pursuit of knowledge involving the recognition and definition of a problem; the collection of data through observation and experimentation; analysis of the data; the formulation, evaluation and testing of hypotheses; and, where possible, the selection of a final hypothesis.

The astute lawyer will have noticed that Rule 702 is very similar to the above definition. It is clear, then, that the foundation of the Rule is the scientific method and engineering certainty can follow from adhering to the method.

Wasted time and resources, client confusion, and an inability of the work performed to assist the trier of fact are all possible outcomes of a poorly defined problem.

Recognition and definition of a problem: This is the foundation for all successive work in an investigation and, as such, its importance cannot be understated. Inappropriately defining the problem to be investigated can lead to a misunderstanding on the engineer's part of the technical issues in a matter. Wasted time and resources, client confusion, and an inability of the work performed to assist the trier of fact are all possible outcomes of a poorly defined problem. The last of these could lead to the engineer's testimony being excluded due to lack of relevance. It is critical, therefore, for the engineer to confer with the client to obtain as much background information as possible: court complaint, witness statements, answers to interrogatories, maintenance records, and photographs and video are just some of the materials that can be useful.

One example is an issue that arises from time to time in bicycle and motorcycle loss-of-control cases. An initial conversation with the client may lead the engineer to define the problem as being how a component on the vehicle failed. After receiving more materials from the client, including the rider's medical records, the engineer is alerted to the rider's having suffered a medical event, such as a heart attack, at the time of the accident. The problem thus expands to include consideration of whether the component failure caused the loss of control or was a result of the accident that occurred due to the loss of control. Contrastingly, the problem could become more focused. For example, the initial stages of investigation into a fire at a propane filling station will certainly be dictated by the generally stated problem of determining how the fire started. As the investigation proceeds, though, the problem to be solved will often be refined into a narrower inquiry such as how the performance of a specific component may have contributed to the fire.

Collection of data through observation and experimentation; analysis of the data: In the context of a forensic engineering investigation, "data" can pragmatically be replaced by "information' without diminishing the spirit of the statements. What information should the engineer collect and how should it be analyzed? A well-defined problem in combination with education, training, and experience are all tools that can help guide the engineer as to the "whats" and "hows" of information collection.[7]

Continued on page 52

InQuis

Evidence-Based Rehab Experts

A Better Way to Evaluate Damages

(843) 566-4208
999 Lake Hunter Circle, Suite A
Mount Pleasant, SC 29464

www.InQuisGlobal.com

But as was discussed, problem definitions can evolve so just as these tools can be helpful they can also blind the engineer to information that may prove to be useful even if its value wasn't immediately apparent earlier in the investigation. The solution, then, to ensure one can achieve engineering certainty must be to collect everything, right? In theory, yes, but in practice that often just isn't possible. Access may be denied to some information. It may not be safe to collect and/or transport certain physical information.[8] Some information, maintenance records for example, may not exist. However, there is an almost unlimited capacity for taking photos and video, making sketches, and taking notes and measurements. Ultimately, the engineer's analyses depend on having information to analyze so the more complete the information set, the more certain can the engineer be about the results of the investigation.

The task of analyzing the collected information takes on multiple meanings. The engineer must not only be concerned that the application of engineering methods and principles to the information is technically sound and the rate of error contained in the results does not render them useless in drawing conclusions but also that the information itself is valid. ASTM Standard E678-07(2013) Standard Practice for Evaluation of Scientific or Technical Data establishes guidelines the forensic engineer can follow, in conjunction with his or her education, training, and experience, to assess the relative validity of the collected information. This aids the engineer in understanding the inherent error in any analysis[9] performed on any of the information.

Formulation, evaluation and testing of hypotheses: At this juncture, even though the forensic engineer has diligently defined a problem and collected and analyzed all the available information, there is still plenty of opportunity to complete the investigation without achieving a reasonable degree of engineering certainty. In developing hypotheses an engineer interprets the analysis results and uses reasoning to make logical connections that provide possible answers to the problem. The hypotheses are then tested[10] to understand if they remain viable considering the test results. These steps are fraught with the dangers of misinterpretation, confirmation bias, and untrue and/or unsound logic in the reasoning process. It also happens frequently enough that insufficient information is available to be able to arrive at a single, definitive answer to the problem. Further evaluation and testing of the multiple possible hypotheses, if appropriate, then seeks to establish the relative likelihood of each. Fortunately, the forensic engineer has one final tool available to help the work achieve engineering certainty: the technical review. It is performed by another engineer or suitably knowledgeable individual who carefully examines the investigating engineer's work for technical merit. The reviewer should have access to all the information available to the investigator. When conducted properly without bias or interest in the outcome the technical review gives the forensic engineer the ability to reliably declare that the opinions derived from the investigation are held to a reasonable degree of engineering certainty, thereby elevating them from possible to probable. ◆

Matthew Wagenhofer, Ph.D., P.E. is a forensic engineer with GDLA Platinum Sponsor FORCON. He has over 20 years of experience conducting and participating in investigations encompassing a broad range of topics under the umbrella of mechanical engineering and materials performance accidents and failures. His expertise includes determining the role that materials and mechanical components play in such multidisciplinary events as fires, explosions, product failures, transportation accidents, business interruption losses, and personal injury and loss of life incidents. He is a member of the National Association of Fire Investigators, the National Society of Professional Engineers.

Endnotes

1 https://www.nafe.org/membership, accessed 7/23/18.

2 ASTM Standard E2713-11 Standard Guide to Forensic Engineering, §7.2.1.1.

3 ASTM Standard E2713-11 Standard Guide to Forensic Engineering, §7.2.2.1.

4 Federal Rules of Evidence, 2018 Edition, ISBN 978-1640020214

5 Rule 702 also allows the expert to possess technical or other specialized knowledge. These were omitted above for ease of presentation.

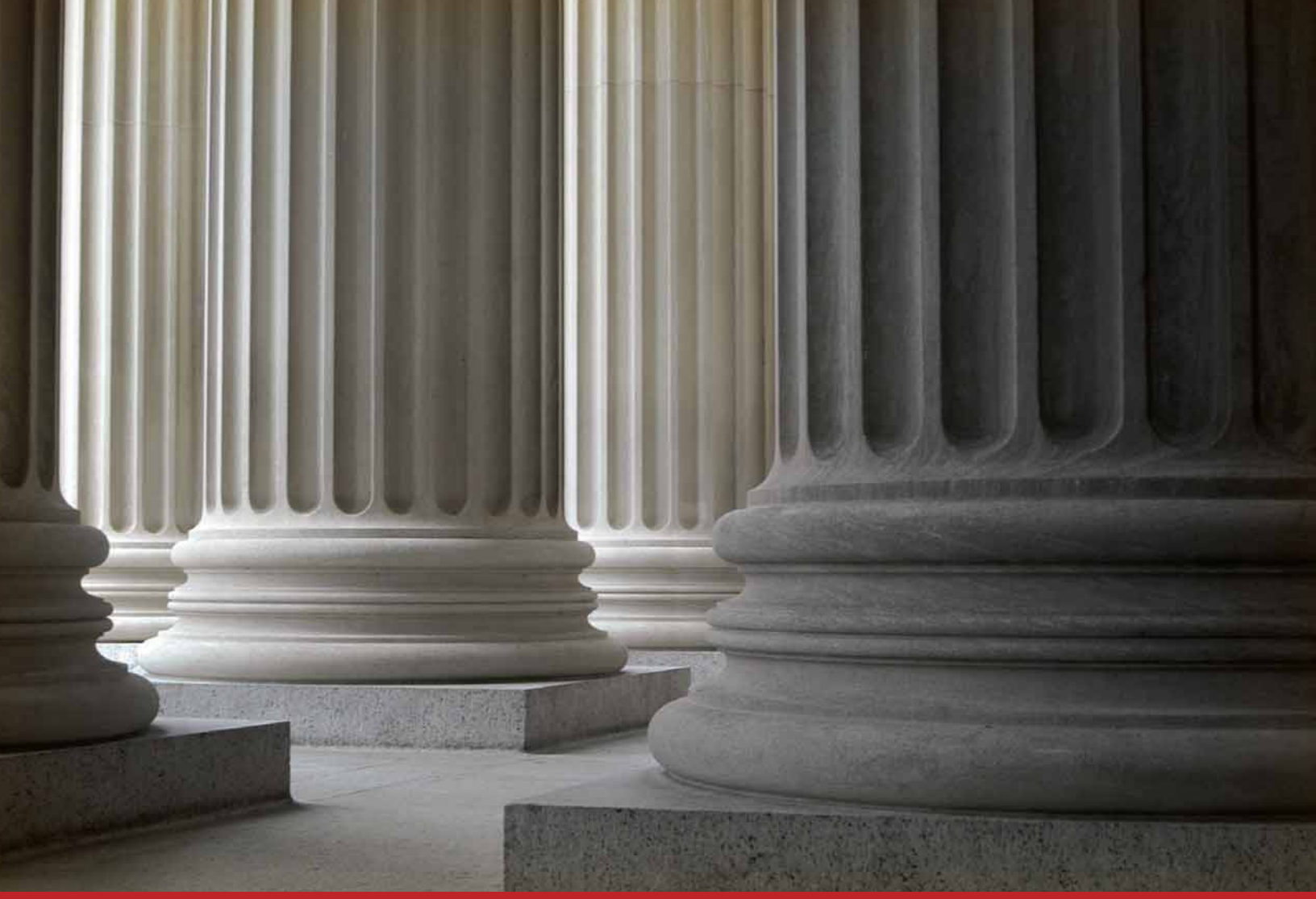
6 NFPA 921 Guide for Fire and Explosion Investigations 2017 Edition, §3.3.160.

7 NFPA 921 and ASTM E1188-11(2017) Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator provide guidance on the collection of information and evidence.

8 This is a particularly acute issue with lithium-ion battery failures as there currently is no reliable, commercially available technology to ensure that a damaged or failed LiB presents little to no risk of entering thermal runaway during transportation or storage.

9 NFPA 921 and ASTM E860-07 (2013)e2 Standard Practice for Examining and Preparing Items That Are or May Become Involved in Criminal or Civil Litigation both establish guidelines for performing laboratory analyses on physical evidence.

10 Hypothesis testing takes on various forms depending on the needs of the matter. Often physical tests of exemplars, or even subject evidence, are performed in controlled settings. In some cases, for example due to the unavailability of physical items, other testing methods such as computational modeling can be employed.



It's difficult to set things right until someone can explain what really went wrong.

When an incident occurs, S-E-A's expertise in scientific evaluation and forensic analysis can be critical in identifying the answers to what happened and why. Our engineers, investigators and imaging sciences specialists have been performing this essential work in the lab, on-site and in the courtroom for nearly 50 years.

S-E-A is here to help.
Visit **www.SEAlimited.com** or call Cliff Walker at **800-743-7672** for more information.

S-E-A

SEAlimited.com

Appellate Case Law

Continued from page 22

limitation for personal injury actions. The trial court granted the hospital's motion. Thomas filed an application for interlocutory appeal, that was granted. The Court of Appeals reversed the trial court. The hospital sought a writ of certiorari and the Supreme Court granted the writ.

In its decision, the Court relied on the statutory language in Federal Rule of Civil Procedure 15, federal trial and circuit court opinions, and similar statutes in other states. Comparing these sources to O.C.G.A. § 9-11-15 and the decision of the U.S. Supreme Court in, *Mayle v. Felix*, 545 U.S. 644, 662 (2005), the Georgia Supreme Court found that three key words in the statute were critical in their analysis. Those words are: "conduct, transition, or occurrence." The Court further stated it would "examine whether the factual allegations in Thomas' original complaint and in the new claims were close in time, place, and subject matter, and involve events leading up to the same injury, such that there was but a single 'episode-in-suit.'" From this, the Court stated, "The United States Supreme Court has recognized that, in a case 'where there was but one episode-in-suit, and no 'separate episodes' at a 'different time and place," an 'amendment related back, and therefore avoided a statute of limitations bar, even though the amendment invoked a legal theory not suggested by the original complaint and relied on facts not originally asserted.'" *Tenant*, at 91. From the facts of the case and the analysis above, the Court concluded that the second amended complaint related back to the date of the original complaint, and thus was not barred by the statute of limitations.

ABATEMENT AND REVIVAL AND WRONGFUL DEATH DAMAGES

***Bibbs et al. v. Toyota Motor Corporation et al.*, 304 Ga. 68 (2018)**
Blackwell, J. All the Justices concur.

Husband's spouse was injured in a motor vehicle accident that left her in a comatose state. Her husband sued Toyota alleging a product defect. The case was tried with a high/low agreement and the jury found for husband Bibbs. Plaintiff husband released Toyota from all personal injuries. Some 20 years later the wife passed away. The family filed a wrongful death lawsuit against Toyota, seeking wrongful death damages. The Federal District Court, Northern District, Richard W. Story, J., certified questions to the Supreme Court: (1) "Under Georgia law, are the damages that may be recovered in a wrongful death action brought by survivors of a decedent limited by a settlement entered into by the decedent's guardian in a previous personal injury suit settling all claims that were or could have been asserted in that suit?" (2) "If the answer is yes, what components of wrongful death damages are barred?" The Supreme Court, Blackwell, J., held that the wrongful death damages were limited by the settlement of the personal injury claim and no economic damages could be recovered in wrongful death action, but noneconomic damages might be recoverable.

The Court began by setting forth the history of the common law and case law. Given those rules, the Court summed that a "wrongful death claim is wholly derivative of Bibbs's personal injury claim," and a family "can only recover those damages that the [decedent] herself could have recovered if she had asserted the claim herself." It then found that it is "undisputed that the husband fully settled her personal injury claim (though not her wrongful death claim) and released Toyota from all damages that she incurred as a result of the car accident." Noting that this raises the question: Could Bibbs again recover the "full value" of her life as measured from the date of her injury. The Court held, "We think not."(emphasis added). The Court's reasoning was: Bibbs could not again recover the full value of her life as measured from the date of her injury. That is, the result of the settlement in her personal injury suit made her whole, so she could not recover economic and noneconomic damages flowing from her disability. To hold otherwise would be to allow impermissible double recovery.

Answering the second question—what components of wrongful death damages are barred—the Court concluded that the components of wrongful death damages that were barred were those that were recovered or recoverable in the fully-settled personal injury action. The full measure of Bibbs's economic damages was recoverable at the time of her personal injury case, and so, there were no economic damages left to recover in the wrongful death suit. As to non-economic damages, the Court declined to find that Ms. Bibbs's life in a coma had zero monetary value. As the Court stated, "Put simply, we cannot say that Bibbs's life in a coma had zero monetary value." As such, a jury may find that a person in a permanent coma might still have some "vestiges of consciousness or inner life." The Court then found that simply being alive in a coma could comfort and hope to her family. From that reasoning, the Court placed those damages back to the federal court, stating, "Whatever the residual value, if any, of Bibbs's life to her while she was in a coma, this question is properly litigated in the district court." ◆

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

NEUTRAL DATABASE PARTNER TO DRI, VOICE OF THE DEFENSE BAR & AMERICAN ASSOCIATION FOR JUSTICE - WWW.NADN.ORG

Fast Track Appointments with Georgia's Top-Rated Mediators & Arbitrators at www.GeorgiaMediators.org

NAME	BASED IN	PROFILE ONLINE AT	PHONE	DATES†
Denny C. Galis	Athens	georgiamediators.org/denny-galis	(706) 549-8242	☐
William Allred	Atlanta	georgiamediators.org/william-allred	(678) 222-0248	☑
W. Bruce Barrickman	Atlanta	georgiamediators.org/bruce-barrickman	(678) 222-0248	☑
Thomas S. Bechtel	Atlanta	georgiamediators.org/thomas-bechtel	(678) 320-9118	☑
Hubert (Hugh) J. Bell Jr.	Atlanta	georgiamediators.org/hugh-bell	(404) 274-4600	☑
M. Gino Brogdon, Sr.	Atlanta	georgiamediators.org/gino-brogdon	(770) 955-2252	☑
Gino Brogdon, Jr.	Atlanta	georgiamediators.org/gino-brogdon	(678) 320-9118	☑
Dennis Caniglia	Atlanta	georgiamediators.org/dennis-caniglia	(404) 313-2706	☐
Luanne Clarke	Atlanta	georgiamediators.org/luanne-clarke	(770) 563-9339	☐
Terrence Lee Croft	Atlanta	georgiamediators.org/terrence-croft	(404) 588-0900	☑
Scott D. Delius	Atlanta	georgiamediators.org/scott-delius	(678) 320-9118	☑
C. Edward Dobbs	Atlanta	georgiamediators.org/edward-dobbs	(404) 420-5529	☑
Robert N. Dokson	Atlanta	georgiamediators.org/robert-dokson	(404) 233-2800	☑
R. Daniel Douglass	Atlanta	georgiamediators.org/daniel-douglass	(404) 739-8807	☑
Victor J. Faenza	Atlanta	georgiamediators.org/victor-faenza	(678) 222-0248	☑
Hon. R. Keegan Federal	Atlanta	georgiamediators.org/keegan-federal	(678) 320-9118	☑
Hon. Susan Forsling	Atlanta	georgiamediators.org/susan-forsling	(678) 320-9118	☑
Arthur H. Glaser	Atlanta	georgiamediators.org/arthur-glaser	(770) 955-2252	☑
William S. Goodman	Atlanta	georgiamediators.org/william-goodman	(770) 955-2252	☑
Joan C. Grafstein	Atlanta	georgiamediators.org/joan-grafstein	(404) 588-0900	☐
Herbert H. (Hal) Gray III	Atlanta	georgiamediators.org/hal-gray	(404) 588-0500	☑
Daniel E. Gulden	Atlanta	georgiamediators.org/daniel-gulden	(404) 303-8250	☑
Hunter R. Hughes III	Atlanta	georgiamediators.org/hunter-hughes	(770) 809-6818	☐
Patrick G. Jones	Atlanta	georgiamediators.org/patrick-jones	(770) 955-2252	☑
N. S. (Ken) Kendrick III	Atlanta	georgiamediators.org/ken-kendrick	(770) 955-2252	☑
Hon. Pat Killingsworth	Atlanta	georgiamediators.org/pat-killingsworth	(678) 222-0248	☑
F. Carlton King Jr.	Atlanta	georgiamediators.org/carlton-king	(404) 588-0900	☐
Daniel M. Klein	Atlanta	georgiamediators.org/daniel-klein	(404) 323-0972	☑
Linda A. Klein	Atlanta	georgiamediators.org/linda-klein	(404) 221-6530	☐
Frank A. Lightmas Jr.	Atlanta	georgiamediators.org/frank-lightmas	(404) 876-3335	☑
Glenn A. Loewenthal	Atlanta	georgiamediators.org/glenn-loewenthal	(678) 320-9118	☑
Ellen Malow	Atlanta	georgiamediators.org/ellen-malow	(404) 556-0757	☑
Randolph A. Mayer	Atlanta	georgiamediators.org/randolph-mayer	(404) 584-9588	☑
John K. Miles Jr.	Atlanta	georgiamediators.org/john-miles	(678) 320-9118	☑
Joseph M. Murphey	Atlanta	georgiamediators.org/joseph-murphey	(678) 320-9118	☑
David C. Nutter	Atlanta	georgiamediators.org/david-nutter	(678) 320-9118	☑
Gregory J. Parent	Atlanta	georgiamediators.org/gregory-parent	(678) 320-9118	☑

NAME	BASED IN	PROFILE ONLINE AT	PHONE	DATES†
Penn Payne	Atlanta	georgiamediators.org/penn-payne	(404) 841-3295	☑
George C. Reid	Atlanta	georgiamediators.org/george-reid	(770) 818-4430	☐
John A. Sherrill	Atlanta	georgiamediators.org/john-sherrill	(404) 885-6703	☑
Pat Siuta	Atlanta	georgiamediators.org/pat-siuta	(770) 955-2252	☑
G. Michael Smith	Atlanta	georgiamediators.org/gmichael-smith	(678) 320-9118	☑
Rex D. Smith	Atlanta	georgiamediators.org/rex-smith	(770) 955-2252	☑
James G. Stewart	Atlanta	georgiamediators.org/james-stewart	(678) 222-0248	☑
R. Wayne Thorpe	Atlanta	georgiamediators.org/wayne-thorpe	(404) 588-0900	☐
Burton L. Tillman	Atlanta	georgiamediators.org/burton-tillman	(404) 315-0000	☑
Thomas W. Tobin	Atlanta	georgiamediators.org/thomas-tobin	(770) 955-2252	☑
Valerie Tobin	Atlanta	georgiamediators.org/valerie-tobin	(678) 222-0248	☑
Hon. Elizabeth Watson	Atlanta	georgiamediators.org/elizabeth-watson	(404) 588-0900	☐
Douglas Wilde	Atlanta	georgiamediators.org/douglas-wilde	(678) 320-9118	☑
Wayne C. Wilson	Atlanta	georgiamediators.org/wayne-wilson	(678) 320-9118	☑
F. Scott Young	Atlanta	georgiamediators.org/scott-young	(678) 222-0248	☑
David M. Zacks	Atlanta	georgiamediators.org/david-zacks	(404) 566-2156	☑
Raymond Chadwick Jr.	Augusta	georgiamediators.org/raymond-chadwick	(706) 823-4250	☑
Hon. Neal Dickert	Augusta	georgiamediators.org/neal-dickert	(706) 828-2001	☑
Stephen E. Garner	Bremen	georgiamediators.org/stephen-garner	(770) 537-3876	☑
Wallace E. Harrell	Brunswick	georgiamediators.org/wallace-harrell	(912) 265-6700	☐
Thomas E. Greer	Carrollton	georgiamediators.org/thomas-greer	(770) 836-8327	☑
David H. Tisinger	Carrollton	georgiamediators.org/david-tisinger	(770) 214-5150	☑
Robert A. Cowan	Dalton	georgiamediators.org/robert-cowan	(706) 278-2099	☑
Philip S. Coe	Fayetteville	georgiamediators.org/philip-coe	(770) 719-9363	☑
James E. Mahar	Gainesville	georgiamediators.org/james-mahar	(770) 532-6312	☑
Bert King	Gray	georgiamediators.org/bert-king	(478) 986-6000	☐
Mark F. Dehler	Hiawassee	georgiamediators.org/mark-dehler	(706) 896-4332	☐
Joel A. Howe	Macon	georgiamediators.org/joel-howe	(478) 749-1734	☑
Roger Mills	Macon	georgiamediators.org/roger-mills	(478) 741-1900	☑
Hon. Lamar Sizemore Jr.	Macon	georgiamediators.org/lamar-sizemore	(478) 254-5040	☑
Thomas E. Cauthorn	Marietta	georgiamediators.org/thomas-cauthorn	(404) 285-0818	☑
Sarah B. Akins	Savannah	georgiamediators.org/sally-akins	(912) 417-2879	☑
Daniel C. Cohen	Savannah	georgiamediators.org/daniel-cohen	(912) 417-2879	☑
Patrick T. O'Connor	Savannah	georgiamediators.org/patrick-oconnor	(912) 236-3311	☑
William C. Sanders	Thomasville	georgiamediators.org/will-sanders	(229) 226-2565	☑
Hon. Ralph F. Simpson	Tifton	georgiamediators.org/rusty-simpson	(229) 388-8420	☑

† Indicates if Available Dates calendar is viewable

6000+ civil mediations were scheduled online for free via www.GeorgiaMediators.org in 2017

Simply visit www.georgiamediators.org/quicksearch and select preferred case type or region

accident reconstruction

1.855.CSI.6776 collisionspecialistsinc.com

CSI
Collision·Specialists·Inc